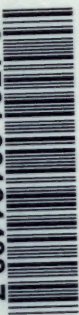


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EQUITABLE CONVERSION.¹

IV.

PREVIOUS to the case of *Ackroyd v. Smithson*,² it was held that an unqualified direction by a testator in his will to sell land, or to buy land with his money, created a complete conversion in equity of the land into money, or of the money into land, and that this conversion was effective for all the purposes of devolution at the testator's death, so that land thus converted would devolve in equity as if it were money, *i. e.*, would go to the executor, in whose hands it would be money for all purposes, for example, for the payment of debts and legacies, and for distribution among the testator's next of kin; and so that money thus converted would devolve in equity as if it were land, *i. e.*, would pass as land to the testator's devisee, or descend to his heir, — so that it would neither be assets for payment of debts, nor liable for legacies, and the testator's next of kin would have no claim upon it.

Upon what theory was it, then, that this equitable conversion by will of land into money or money into land was held to have the effect of causing land to devolve in equity at the testator's death as if it were money, and money as if it were land? It is plain, and always was plain, that a will can produce no effect till the testator's death.³ If, then, a testator devise his land to trustees

¹ Continued from 18 HARV. L. REV. 245.

² 1 Bro. C. C. 503.

³ In *Beauclerk v. Mead*, 2 Atk. 167, a testator by his will devised his land, in the events which happened, to his sister for life, remainder to A for life, remainder to B for life, and he also directed the residue of his personal estate to be laid out in purchase of land to be settled to the same uses to which his land was devised. By a

in trust to be sold, but fail to make an effective disposition of all the proceeds of the sale, what will happen at his death? Why, the trustees will acquire, under the will, the legal ownership of the land, while each person to whom any portion of the produce of the land is given will acquire an equitable right to have the land sold, and his share of the proceeds paid to him, as well as, incidentally, a right to receive, until the sale is made, the rents and profits of so much of the land as his share of the proceeds of the sale shall represent. On the other hand, so much of the land as shall be represented by the undisposed of proceeds of its sale, will descend in equity to the heir, and, when his title to the land shall be divested by a sale, he will be entitled to receive in exchange a like proportion of the proceeds of the sale. The personal representative will, therefore, have no more to do with the testator's land, or with the proceeds of its sale, than he would have had to do with the land if the testator had died intestate. All this, moreover, is so plain that it seems that the courts must have proceeded upon some other theory in holding the contrary.

Can they have proceeded upon the theory that, as a testator can dispose by his will of the proceeds of a sale of land which he directs by the same will, so such proceeds, if undisposed of, will devolve upon his personal representative? No, clearly not, or at least no such theory can be maintained; for such proceeds have no existence till after the testator's death, nor till after a sale is actually made, and it is only the property and rights of a person which are in actual existence that can devolve at his death on his

codicil he directed that, on the death of his sister, his land should go, in the events which happened, not to A and B successively for life, but to them jointly for their lives; and, the question being whether the word "land," in the codicil, included the residue of the testator's personal estate, that being land in equity when the codicil was made, Lord Hardwicke answered that it did not, and that it meant the same in the codicil that it did in the will, the residue of the personal estate, not, in truth, becoming land in equity till the testator's death. He said (page 169): "It has been insisted on for the plaintiff that if a man makes a will and disposes of lands, that such devise will pass, not only what the law will pass, but what equity passes likewise, which is money directed to be laid out in land. . . . I allow that the rule laid down by the bar, that money directed to be invested in land, must be considered as land, is very right, but then it is truly said the will must be complete, for it is ambulatory till the testator's death, nor till then can it be considered as land; for would not his personal estate have been subject to all intents and purposes to his debts, supposing there had been any, notwithstanding the devise that the surplus should be invested in land? Suppose the testator had given, by his codicil, all his lands to another person, and his heirs, can anybody doubt whether this would not have made a total variation as to the devisees under the will?"

representatives by operation of law. When a testator by his will makes a gift of such proceeds, the gift is future and executory, and there is in devolutions of property by operation of law nothing analogous to future and executory gifts.

What other theory is there, then, which the courts may have adopted? In framing the question with which the last paragraph but one begins, I have used the words "causing the land to devolve in equity," etc.; and I have used these words because, first, the equitable interest in the land is the only thing that can devolve by operation of law in the case supposed; secondly, the equitable interest in the land is the thing that was in fact held to devolve as if it were money; thirdly, there are only two possible alternatives, as the land must either descend as land to the heir, or it must devolve as money upon the personal representative; and, as it was held to do the latter, and as it could so devolve on the supposition that it had been directly converted by equity into money, and on that supposition alone, it seems that that must have been the theory upon which the courts acted. In other words, while an indirect equitable conversion is in truth only a first step towards an alienation of the thing to be converted, and a specific performance of the contract or trust which causes the conversion is indispensable to complete the alienation, the courts acted upon the theory that such a conversion constituted in itself, at the testator's death, a complete alienation in equity of the thing to be converted from the testator's heir to his executor, and from his executor to his heir, and hence that such a conversion of land was a conversion of it, not only as to the executor, but as to the heir as well, and that such a conversion of money was a conversion of it, not only as to the heir, but as to the executor as well. In short, it was held that an indirect conversion, made by will, was an absolute conversion, in so far as it is possible for equity to make an absolute conversion, that land so converted became the absolute property of the testator's executor, in so far as it is possible for an equitable owner to be an absolute owner, and that money so converted became the absolute property of the testator's heir or devisee, in so far as it is possible for an equitable owner to be an absolute owner.¹

It must not be supposed, however, that courts of equity in thus treating indirect equitable conversions as if they were direct, acted

¹ See *infra*, p. 14; p. 20, n. 6.

consciously; for in truth they have never recognized the division of equitable conversions into such as are direct and such as are indirect, but have always assumed that all equitable conversions constituted one class only, and have never raised any question as to whether they are made directly or indirectly; and hence they have, not unnaturally, assumed that the effects produced by any equitable conversion will be produced by every equitable conversion, and that whatever is true of any equitable conversion is true of all equitable conversions. Hence, too, the courts, when dealing with an equitable conversion of one kind, have applied to it a mode of reasoning which is applicable to equitable conversions of that kind or which is applicable only to equitable conversions of the other kind, according as the one mode of reasoning or the other best supported the view which they were seeking to establish. More particularly, however, and for reasons stated in a previous article,¹ they have been in the constant habit of applying to indirect conversions reasoning which is applicable only to direct conversions.

What were the authorities by which the foregoing view was supposed to be established? First, there were the two cases of *Mallabar v. Mallabar*² and *Durour v. Motteux*,³ in each of which the decision must have been in favor of the next of kin, but for the fact that there was a residuary bequest which was held to carry everything. There was also the case of *Ogle v. Cook*,⁴ which was supposed by everyone to contain an actual decision in favor of the next of kin and against the heir, until Lord Loughborough, fifteen years after *Ackroyd v. Smithson* was decided, declared,⁵ as the result of an examination of the Registrar's Book, that, though the point was involved, it was not actually decided by the decree which was made, but was reserved for further consideration. Lastly, there was the case of *Fletcher v. Chapman*,⁶ which was the converse of *Ackroyd v. Smithson*, *i. e.*, the testator had directed money to be laid out in the purchase of land, but he had disposed of a life interest only in the land to be purchased, and (according to Tomlin's head note) it was held by Lord Somers, whose decree was affirmed by the House of Lords, that the testator's heir was entitled to the money, subject to the life interest. Lord Cottenham, however, when Master of the Rolls,

¹ See 18 HARV. L. REV. 248, 249.

² 1 Ves. 320, 1 Sim. & St. 292, n. (d).

³ *Collins v. Wakeman*, 2 Ves. Jun. 683.

⁴ *Cas. t. Talbot*, 78.

⁵ 1 Ves. 177.

⁶ 3 Bro. P. C., Tomlin's ed., 1.

concluded, after a careful examination of the case, that the point was not involved, and hence that the decision did not preclude him from deciding the point as he thought right.¹ On the other hand, *Digby v. Legard*,² which was the latest case cited in *Ackroyd v. Smithson*, having been decided within six years,³ was thought to be a very strong authority in favor of the heir and against the next of kin, and to be entitled to great weight. It had not, however, been reported when *Ackroyd v. Smithson* was argued and decided, nor was there then any statement of it in print. There was, indeed, a statement of it by Sir T. Sewell, M. R., in the then unreported case of *Fletcher v. Ashburner*,⁴ and from that statement it was cited in *Ackroyd v. Smithson*. According to that statement, however, real estate only was devised, and hence the case was cited, in *Ackroyd v. Smithson*, as one which did not involve the blending of real and personal estate into one fund. When, however, it came to be reported, first by Mr. Cox, in his note to *Cruze v. Barley*⁵ and afterwards in *Dickens*,⁶ it appeared that it did involve the element of blending; and therefore, in that respect, it was precisely in point for the heir in *Ackroyd v. Smithson*, though it had been supposed not to be so. For another reason, however, the report in *Dickens* shows that the decision was not any authority in favor of the heir, or against the next of kin, in *Ackroyd v. Smithson*; for it appears that the reason of the decision in favor of the heir was that the land was merely charged with the payment of the testator's debts and legacies in aid of the personal estate, and that no more of the land was directed or authorized to be sold than should be necessary to satisfy the charge. The case of *Emblyn v. Freeman*⁷ was also cited in *Ackroyd v. Smithson* as an authority in favor of the heir. The facts of that case, however, are not such as to render the decision in favor of the heir of much value.⁸

¹ This opinion was expressed by Sir C. C. Pepys (afterward Lord Cottenham) in his judgment in *Cogan v. Stephens*, decided Nov. 24, 1836. The judgment is given in full in an appendix to the first three editions of *Lewin on Trusts*. The case is also reported in 5 L. J. N. S. Chan. 17.

² 3 P. Wms. 22, n. 1; 2 Dick. 500.

³ *Digby v. Legard* was decided in June, 1774, and *Ackroyd v. Smithson* in June, 1780.

⁴ 1 Bro. C. C. 497, 501.

⁵ 3 P. Wms., 4th ed., 22, n. 1, published in 1787. *Fletcher v. Ashburner* was decided just a year before *Ackroyd v. Smithson*. Both cases were first reported by Brown in his second edition, published in 1790.

⁶ 2 Dick. 500. *Dickens* was published in 1803.

⁷ Ch. Prec. 541.

⁸ See 18 HARV. L. REV. 87.

Such, then, are the authorities in support of the view which, I have said, prevailed prior to *Ackroyd v. Smithson*; and, though they are, upon the whole, stronger than they were supposed to be when *Ackroyd v. Smithson* was decided, they can hardly be said to be decisive. Whether decisive or not, however, the opinion has been universal, since *Ackroyd v. Smithson* was decided, that, prior to that date, the law was as I have stated it to be.

What, then, was the change introduced by *Ackroyd v. Smithson*? The testator, in that case, by his will gave all his land, not therein before given, and all his personal estate to two trustees in trust to sell the same, and, out of the proceeds, to pay the testator's debts and pecuniary legacies, including a legacy to each of fifteen persons, and to divide the residue among the same fifteen persons in proportion to their respective legacies. Two of these legatees died before the testator, and so the gifts to them lapsed; and, the property having been sold, the question was what should be done with so much of the money intended for them as was produced by the sale of the land. It was claimed by the testator's next of kin to belong to them, as having become part of the testator's personal estate, and they filed a bill against the trustees to enforce their claim, making the thirteen surviving legatees and the testator's heir co-defendants. The case was first heard by Sir T. Sewell, M. R., who gave the entire fund, *i. e.*, the produce of the land as well as the personal estate, to the thirteen surviving legatees, whereupon the plaintiffs appealed, and the appeal was heard by Lord Thurlow, who decided in favor of the heir. The latter was represented by Mr. Scott (afterwards Lord Eldon¹) who argued the cause fully at both hearings. His argument before Lord Thurlow is reported as written out by himself and furnished to the reporter.² The heir in fact made no claim to the money, but, being a necessary party to the suit, he had to be represented by counsel at the hearing, and accordingly his solicitor instructed Mr. Scott (who was then only twenty-eight years old, and who had been only four years at the bar³) to represent him, and consent, on his behalf, to whatever decree the court should see fit to make, giving

¹ Lord Eldon gave in a conversation, a little more than three weeks before his death, a very interesting account of his connection with *Ackroyd v. Smithson*. See 1 Twiss, *Life of Lord Eldon*, 116-120.

² See 1 Bro. C. C., Belt's ed., 503, n. 1.

³ Lord Eldon tells us that during his first eleven months at the bar he received nothing, that during the twelfth month he received half a guinea; see 1 Twiss, 100.

him a fee of one guinea, that being the established fee for such a service. Mr. Scott, however, having satisfied himself that the heir was entitled to the money, so advised him, and declined to represent him unless he could argue the case; and the result was that he argued it at each hearing without a fee, *i. e.*, on receiving a fee merely for consenting to a decree, the heir declining to increase his fee and thus "send good money after bad."¹

At the hearing before Lord Thurlow, the counsel for the next of kin contended² "that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of *Mallabar v. Mallabar* and *Durour v. Motteux* must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard*." Mr. Scott also said:³ "If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of the lapsed devises would, according to the case of *Digby v. Legard*, and the principle of the case of *Emblyn v. Freeman*, and of many others, have accrued to the heir at law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir at law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made:—but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of *Durour v. Motteux*, and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal.—We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives." Such were the views of the counsel for the next of kin, so far as we know them, and such were their admissions in favor of the heir and Mr. Scott's admission in favor of the next of kin. It was, therefore, agreed between them that everything depended upon the testator's intention. How, then, was his intention, as to the conversion of his

¹ 1 Twiss, 118.

² 1 Bro. C. C. 505.

³ 1 Bro. C. C. 506.

land into money, to be ascertained? According to Mr. Scott, the way was, first, to inquire for what purposes he had directed his land to be sold, and, secondly, to what extent those purposes had been effective; for, as to such purposes, if any, as had failed to take effect, Mr. Scott insisted that it was the same as if those purposes had never been declared by the testator. He also argued, with great force, that the entire burden of proof was on the next of kin; that it was not necessary, therefore, for the heir to show that the testator had any intention in his favor, it being sufficient for him that no intention had been shown in favor of the next of kin, while it was indispensable for the next of kin to show an intention in their favor, as their claim had no other foundation to rest upon.

To the argument which the counsel for the next of kin founded upon the blending of the testator's land and personal estate into one fund, Mr. Scott made the same answer as to the rest of their argument, namely, that the testator intended that the two funds should be blended into one only for the purposes of the gifts which he had made of the blended fund, and, therefore, only so far as those gifts should be effective.

It will be seen, therefore, that Mr. Scott came very near taking what is conceived to be the correct view, namely, that the extent to which the testator had converted his land into money in equity depended upon the extent to which he had made effective gifts of the proceeds of the sale which he had directed, and he never once alluded to the testator's direction to sell his land as measuring the extent of its conversion in equity. Indeed, he fell short of taking the view that the extent of the equitable conversion depended wholly upon the extent of the gifts just referred to, only by making those gifts the sole evidence of the testator's intention to convert, instead of making them the measure of the conversion without regard to the testator's intention to convert.

There was one feature of the case, however, which Mr. Scott's argument thus far failed to meet; for, though the proceeds of the sale of the land had not all been disposed of, a sale of all the land was no less necessary than it would have been if all the proceeds of the sale had been disposed of, there being no other way of ascertaining what amount of money the thirteen surviving legatees were entitled to receive; and, though Mr. Scott had very skilfully diverted the attention of the court from the question whether a sale of all the land was necessary, and had directed it exclusively to the consequences to be deduced from the testator's

failure to make an effective gift of all the proceeds of the sale, yet upon authority it was the intention of the testator to have the land sold, or the existence of a right created by him to have it sold, that caused its conversion in equity, and the testator's failure to dispose of all the proceeds of the sale was material only so far as it showed an absence of such intention, or the non-existence of such a right. What was the testator's intention, then, in the events which had happened, as to the sale of his land? Clearly it was that it should all be sold. To be sure, the evidence of this intention was not as direct as it would have been if the testator had made an effective gift of all the proceeds of the sale which he directed, but it was no less certain. When a testator creates a trust as to land which can be carried into effect only by a sale of the land, the law regards it as certain that a sale of the land was intended. It is equally clear also that there existed a right, created by the testator, to have all the land sold. Indeed, such a right existed in each of the thirteen surviving legatees.

It follows then that, upon authority, there was a complete conversion in equity of all the land into money; and, if so, it also follows, from Mr. Scott's own admission, that the next of kin were entitled to so much of the proceeds of the sale as would have gone to the two deceased legatees if they had survived the testator; for, though in terms he admitted only that a testator "may decide what shall be the nature of his property after his death," yet it is by means of equitable conversion alone that a testator can decide that his land shall, after his death, have the nature of money, or that his money shall have the nature of land. Moreover, if a testator can do this by any equitable conversion which he can make, the testator did it in *Ackroyd v. Smithson* by the equitable conversion which he made.

How, then, did Mr. Scott deal with the admitted fact that a sale of all the land was necessary? The answer is that, in terms, he did not deal with it at all, and his reason seems to have been that he regarded the fact that all the land had been actually sold as having rendered immaterial the fact that a sale of it all was necessary, and accordingly he dealt with the former fact instead of the latter. How did he deal with it? Simply by insisting that so much of the proceeds of the sale as was intended for the two deceased legatees was still land in equity. He said: "Money undisposed of, arising from the sale of lands, in this court is land; and, as such, the heir claims it. Suppose all the fifteen legatees had died in the

lifetime of the testator, would it not have been competent to the heir at law to have insisted, in equity, that no sale should be made of the real estate?¹ . . . If then, in case all the residuary legatees had died, the heir could have prevented a sale,—is it to

¹ 1 Bro. C. C. 507. Lord Eldon also used similar language judicially, more than thirty years later in the case of *Hill v. Cock*, 1 Ves. & B. 173, in which he said: "The only point, calling for decision under this bill, is whether the money arising from the sale of the real estate, which it is not necessary to apply for the only purpose expressed in the will, is to be considered real or personal estate. . . . Where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly or partially, in the former case though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty. . . . So much of the residue of this money as arose from real estate, must be considered as real and be declared to belong to the heir." Nor was Lord Eldon peculiar in this respect. In *Green v. Jackson*, 5 Russ. 35, 2 R. & M. 238, Sir J. Leach, M. R., said (p. 38): "If a testator directs his real estate to be sold, and the produce to be applied for a particular purpose only, and that purpose fails, the money intended for that purpose retains the quality of real estate, and belongs to the heir." So also as late as 1864 Lord Westbury, when Lord Chancellor, in moving the judgment of the House of Lords in *Bective v. Hodgson*, 10 H. L. Cas. 657, said (p. 666): "The decree [in *Hopkins v. Hopkins*, Cas. 4 Talb. 44, which had been relied upon by the appellant] was governed by an error which then prevailed, namely, that personal property directed to be converted into realty was converted for all purposes whatsoever, not only the purposes of the will, but the purposes of ownership in every form and by every title. And accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no direction given by the will, and cannot by any possibility be made to claim under the will. That prevalent error was not corrected until the decision of the case of *Ackroyd v. Smithson*, which decided a point that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate, for the purpose of ascertaining the ownership, that is, the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership." The instances also are common in which judges speak of money as being land in equity for no other reason than that the heir as such is entitled to have it paid to him. The reason for the prevalence of this language seems to have been that a notion prevailed that an heir as such cannot be entitled to money unless it is land in equity. It is true that money cannot descend to an heir unless it is land in equity; but land which has descended to an heir is, of course, as liable to be converted into money as any other land, and the consequences of its conversion are the same as in other cases.

be said that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention."¹ To this it may be answered, first, that Mr. Scott's contention that the money in question was land in equity, was not at all necessary for his case, as the heir had the same right to the money after the sale, that he had before the sale to the land which the money represented;² secondly, the money in question could not be deemed land in equity for any purpose. The only way in which equity can regard money as land is by converting it directly into land, and, as the land in question had been actually converted into money by the direction of its owner, equity had no right whatever to reconvert it into land.

The real difficulty, however (upon authority, for there is no difficulty upon principle), lies in the fact, not that the land had all been sold, but that its sale had been directed by the testator, and to that fact Mr. Scott gave no answer. While, therefore, the money in controversy clearly belonged to the heir, Mr. Scott did not succeed in proving that it belonged to him; and, indeed, he attempted a feat, the performance of which was impossible, namely, to establish his contention by authority.

What, then, is to be said of Lord Thurlow's decision? From Brown's report of the case, one would infer that the decision was rendered at the conclusion of the argument, but Lord Eldon tells us that "Thurlow took three days to consider"³ before delivering his judgment. According to the report he disposed of the case in a few informal observations. He said,⁴ "he fully approved the determination in *Digby v. Legard*; he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed of money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet to say that, because a

¹ Page 508.

² See 18 HARV. L. REV. 4.

³ "Well, Thurlow took three days to consider, and then delivered his judgment in accordance with my speech, and that speech is in print, and has decided all similar questions ever since." 1 TWISS, 119.

⁴ 1 BRO. C. C. 514.

sale was necessary, the heir should not take the undisposed of part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir." It will be seen, therefore, that, if Lord Thurlow is correctly reported, his original opinion in favor of the next of kin was founded on the fact that the purposes of the testator which had taken effect made it necessary that all the land should be sold. Why then had he abandoned that view? One reason was that he regarded *Digby v. Legard* as a direct authority against it; but in that, as we have seen, he was in error. Another reason given by him was that, if all the fifteen legatees had died before the testator, all the land would have gone to the heir, and therefore it followed that, as some, but not all, of the legatees had so died, a proportional part of the land ought to go to the heir, though a sale of all the land would be necessary in the latter case, and none of it in the former. In other words, he had become convinced that the rights of the heir ought not to depend upon the mere question whether the testator's purposes required a sale of the land. It will be seen, therefore, that Lord Thurlow came very near accepting the proposition that a testator causes an equitable conversion of his land into money, not by directing a sale of it, but by making some effective disposition of the proceeds of the sale, and hence that the extent of the conversion, if there be a conversion, is in proportion to the extent of the disposition of the proceeds of the conversion. He did not, however, accept that proposition, but professed to go upon authority, and, upon authority, the difference between the effect produced by the deaths of all the legatees, and the deaths of some of them only, is decisive. Moreover, it is very far from being clear, upon authority, that a sale of all the land would not have been necessary, even though all the legatees had died before the testator.¹ Hence both of Lord Thurlow's reasons for changing his mind seem to fail.

Nor do Lord Thurlow's reasons enable anyone to say upon what legal ground he decided in favor of the heir, and therefore all that he can be regarded as having decided is that the heir was entitled to the money in controversy. Hence it follows that the decision is not properly an authority for any legal proposition, but has the authority of a precedent only. As a precedent, however,

¹ See *infra*, p. 24, proposition 8.

it is an undoubted authority that where a testator directs a sale of his land, but dies intestate as to some portion of the proceeds of the sale, that portion of the proceeds, or so much of the land as it represents, will go to the heir, and not to the next of kin;¹ and accordingly *Phillips v. Phillips*² is the only case, since *Ackroyd v. Smithson*, in which, such a question as the foregoing being involved, the decision has been in favor of the next of kin; and the decision in that case, after being universally disapproved of for twenty-one years, was at length formally overruled by Lord Cranworth in *Taylor v. Taylor*.³

Indirectly, however, the decision in *Ackroyd v. Smithson* was the means of establishing rules and distinctions theretofore unheard of. For example, after that decision it was no longer true that an unqualified direction in a will to sell land caused an absolute conversion of the land into money, irrespective of the purposes for which the sale was directed, or of the extent to which those purposes took effect; for, as was said by Sir W. Grant, in *Williams v. Coade*,⁴ "There could not be a more absolute direction for conversion than that in *Ackroyd v. Smithson*"; and yet it was there held that there was not an absolute conversion of all the land, in the sense in which the term conversion was then understood, and hence there soon came to be a clear distinction between a conversion "out and out" and a conversion for the purposes of the will only. Thus, in 1787, Mr. Cox, in his note to *Cruse v. Barley*, said⁵ the several cases on the subject of equitable conversion "seem to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will." Six years later, he added to the above the following:⁶

¹ *Robinson v. Taylor*, 2 Bro. C. C. 589; *Williams v. Coade*, 10 Ves. 500; *Berry v. Usher*, 11 Ves. 87; *Smith v. Claxton*, 4 Madd. 484; *Hill v. Cock*, 1 Ves. & B. 173; *Maugham v. Mason*, 1 Ves. & B. 410; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Jessop v. Watson*, 1 M. & K. 665; *Eyre v. Marsden*, 2 Keen 564; *Williams v. Williams*, 5 L. J. (N.S.) Ch. 84; *Fitch v. Weber*, 6 Hare 145; *Johnson v. Woods*, 2 Beav. 409; *Flint v. Warren*, 16 Sim. 124; *Gordon v. Atkinson*, 1 De G. & Sm. 478; *Shallcross v. Wright*, 12 Beav. 505; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Christian v. Foster*, 7 Beav. 540, 2 Ph. 161; *Robinson v. London Hospital*, 10 Hare 19; *Taylor's Settlement, In re*, 9 Hare 596; *Hatfield v. Prime*, 2 Coll. 204; *Wilson v. Coles*, 28 Beav. 215; *Bagster v. Fackereell*, 26 Beav. 469; *Hamilton v. Foot*, Ir. R. 6 Eq. 572; *Richerson, In re*, [1892] 1 Ch. 379; *White v. Smith*, 15 Jur. 1096; *Bedford v. Bedford*, 35 Beav. 584.

² 1 Myl. & K. 649.

³ 3 De G. M. & G. 190.

⁴ 10 Ves. 500, 504.

⁵ 3 P. Wms. 4th ed., 22, n. 1.

⁶ 3 P. Wms. 5th ed., 22, n. 1.

"For unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but further that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will, at the time of the testator's death (whether from the silence or the inefficacy of the will itself, or from subsequent lapse) will result to the heir."

On the death of the testator in *Ackroyd v. Smithson*, only three different rights devolved from him relating to his land, namely, first, the legal ownership of the land, which devolved upon the trustees by the devise to them; secondly, the equitable ownership of the land, which descended to the testator's heir; and, thirdly, the right to have the land sold, *i. e.*, exchanged for money, and to receive the money or some portion of it, with the incidental right to receive the rents and profits of the land until the sale was made. This third right did not, indeed, in strictness devolve from the testator, for it was never in him, but was newly created by his will, and not till the moment of his death, and it vested originally in each of his thirteen surviving residuary legatees, and in no one else. It could not possibly vest in the testator's next of kin, as it was not created in their favor. As, therefore, no right was created by the will in favor of anyone to receive that portion of the produce of the land which was intended for the two deceased legatees, it necessarily belonged to the heir, to whom the land which it represented belonged when the sale was made. How, then, could the notion ever be entertained that the next of kin stood in the place of the two deceased legatees? Such a notion, as I have already said,¹ is intelligible only on the assumption that the case was a wholly different one from what it was in fact, namely, that that portion of the land, the produce of which was intended for the two deceased legatees, was, at the moment of the testator's death, converted directly into money by equity itself, and hence, being undisposed of, it belonged to the next of kin. It will be seen, therefore, when the question is considered according to the truth of the case, that the right of the heir did not depend upon whether that portion of the land, the produce of which was intended for the two deceased legatees, had been converted by the will into money in equity. The only difference was that, if it had

¹ See *supra*, p. 3.

not been so converted, it not only devolved in equity upon the heir, but was land in his hands until it was actually sold, while, if it was so converted, though it still devolved upon the heir, yet he took it as money, and hence, if he had died the day after the testator it would have gone to his personal representative.

The courts, however, seem to have thought the question between the heir and the next of kin depended upon whether there had been an equitable conversion or not, and that the latter question was purely a question of the testator's intention; that accordingly, in *Ackroyd v. Smithson*, if the testator intended to convert all his land into money, the next of kin were entitled to stand in the place of the two deceased legatees, but that, if the testator intended a conversion only coextensive with the disposition which he had made of the proceeds of the sale, the heir was entitled to stand in the place of the two deceased legatees. Thus far, therefore, there was no conception of the idea of an heir's taking land by descent, and yet taking it as money, the idea being that the heir took it, if it was land in equity, and the next of kin, if it was money. In *Robinson v. Taylor*,¹ however, decided in 1789 (nine years after *Ackroyd v. Smithson*), Lord Thurlow started the idea² that the heir must take unless the testator showed an intention, not merely that the land should be converted, but that its conversion should take effect as from a date prior to the testator's death, it being assumed that the testator's power to make such a conversion was free from doubt. This idea, moreover, has since exerted a great influence, particularly in preventing testators from so converting their land into money as to cause it to devolve upon their next of kin. It soon had the effect, also, of establishing the dis-

¹ 2 Bro. C. C. 589.

² Lord Thurlow said (p. 594): "The difficulty is to find that an unsold residue of real estate can, by any means, go from the heir at law. Inferences have been admitted, where the testator has not expressed himself clearly, to show that he meant to convert the real into personal estate. If it is once deemed sufficient that he meant it to be turned into money, to make it the same as if it had been money before his death, then you will have the testator declaring that he did so. In all the cases, it has been, where he meant it to be converted, out and out, that the testator meant it should become money, but the question is whether he meant it to be the same as if it had been money before his death. It has not been held to be part of the personal estate, but to be disposed of as if it was part of the personal estate. The heir at law is entitled to the residue as a resulting fund. . . . I do not see how the personal representative can ever get at that which was not personal at the death of the testator, but by an express direction — therefore, I think the heir at law, here, is entitled to the residue of the real estate as a resulting fund."

inction between an heir's taking land as land and taking it as money; for, if a testator showed an intention to convert his land into money, but not so to convert it as to carry it to the next of kin, it followed that it must go to the heir, and yet he could take it only as money, as it would be converted into money in equity immediately on the testator's death. Suppose, however, it should turn out that, while Lord Thurlow's idea was adhered to in other respects, a testator had no power so to convert his land into money by will that the conversion would take effect before his death. Of course the consequence would be that the heir would take, whether there was an equitable conversion or not, taking the land as land if there was not an equitable conversion, and taking it as money if there was. Moreover, that was virtually what happened. Thus, in *Sheddon v. Goodrich*,¹ where a testator, by a will attested by three witnesses, had directed his land to be sold, and had made a disposition of the proceeds of the sale, it was held by Lord Eldon that he could not by a subsequent will, attested by two witnesses only, change such disposition; and in *Hooper v. Goodwin*,² where land was directed by will to be sold, it was held by Sir W. Grant, M. R., that the produce of the sale could not be disposed of by an unattested codicil; and, in neither of these cases was any inquiry made as to the time when the testator intended the equitable conversion of his land should take effect. After these decisions, therefore, it seems to have been impossible to contend that any equitable conversion by will could take effect before the testator's death. Accordingly, in the well-considered case of *Smith v. Claxton*,³ where a testator made two separate devises of two parcels of land in trust to be sold for purposes which totally failed, as to the land first devised, and which partially failed, as to the land secondly devised, and the testator's heir died soon after the testator and before either parcel of land was sold, Sir J. Leach, V. C., held that, in the events which had happened, the testator did not intend to convert the parcel of land first devised, and hence it descended in equity to the heir, and he took it as land; but that he did intend to convert the entire interest in the land secondly devised, a sale of the entire interest being necessary for the purpose which had taken effect, and, therefore, though the undivided half of the land, as to which the purpose of the sale had failed, had descended to the heir in equity, the

¹ 8 Ves. 481.² 18 Ves. 156.³ 4 Madd. 484.

equitable conversion of it not coming in time to intercept its descent to him, yet the heir took it, not as land, but as money. So also, fourteen years later, in the case of *Jessopp v. Watson*,¹ where the testator devised his land in trust to be sold for the payment of his debts, legacies, and annuities, and also for other purposes which totally failed, the same learned judge, then Master of the Rolls, held that, in the events which had happened, the testator intended that the land should be sold, namely, for the purposes which had taken effect, and, therefore, though the land had descended to the heir, subject to debts, legacies, and annuities, yet he took it as money.²

The fact that land directed by a will to be sold, will descend to the testator's heir, so far as the proceeds of its sale are not otherwise disposed of, notwithstanding that the land has been entirely converted in equity by the will, proves also that the testator's next of kin can never derive any benefit from land so directed to be sold, unless the will contain a direct gift to them. This latter proposition is, moreover, also directly established by authority. Thus, in *Jarman on Wills*,³ the learned author, after quoting that portion of Mr. Cox's note to *Cruse v. Barley* which was published in 1787,⁴ says: "There seems to be no ground to except to this statement of the doctrine, provided that, by an intention to give to real estate the quality of personalty 'to all intents' we are allowed to understand something very special and unequivocal, amounting in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition, 'But that every conversion, however absolute in its terms, will be

¹ 1 Myl. & K. 665.

² I shall endeavor to show hereafter that there was, in truth, no equitable conversion in *Jessopp v. Watson*, whatever the testator's intention may be supposed to have been in regard to a sale of the land, as the debts, legacies, and annuities, for the payment of which alone a sale was to be made, constituted only a charge on the land. See also 18 HARV. L. REV. 83-93.

³ Vol. I., 1st ed., p. 558, published in 1843.

⁴ See *supra*, p. 13.

deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.' " So also, in the very carefully considered case of *Fitch v. Weber*,¹ Wigram, V. C., said: "The next of kin are claiming property of the testator, which at his death was real estate, and, in order to substantiate that claim they must make out from the will that they are devisees of the property; not being mentioned in the will, they must make out a devise by implication, — which might be sufficient, although Lord Thurlow, in *Robinson v. Taylor*, has said he 'did not see how the personal representatives could get at that which was not personal estate at the death of the testator but by express words.' The law is to some extent clear upon authority; a devise upon trust to sell and convert real estate into money is, in some sense, a direction to turn real into personal estate, but it is clear that such a devise will not necessarily entitle the next of kin to claim any portion of the proceeds of the sale of real estate which, by the terms of the will or in event, is or becomes undisposed of. The will in that case may determine the quality in which the property will devolve upon those who take it, but is silent as to the persons upon whom it shall devolve. The testator clearly means the real estate to become money after his death, but (as Lord Thurlow said in the case referred to) the question is, whether he means it to be the same as if it had been money before his death. . . . In the simple case of a devise upon trust to sell, and no trust of the surplus declared, it has apparently been thought by some text-writers that the court would be driven to imply a trust for the next of kin; but that has never been so decided, and if ever such a case should call for decision, it may deserve much consideration. However clear, in such a case, it may be that the testator means his real to be treated as personal estate after his death, the question remains, does he mean it to be treated also as if it had been personal estate before his death? — that (as Lord Thurlow observed) is the question." In *Johnson v. Woods*,² also, Lord Langdale, M. R., said: "It is undoubtedly practicable for a testator to say that his real estate shall be sold, and that the produce shall go to such persons as are by law entitled to his personal estate. When, therefore, it can be

¹ 6 Hare 145, 147.

² 2 Beav. 409, 413.

ascertained that a testator intended that the produce of real estate should, to all intents and purposes, be treated as personal estate possessed by him at his death, so as to devolve upon the person entitled to his personal estate, the court will give effect to that intention." In *Flint v. Warren*,¹ Shadwell, V. C., said: "The testatrix has directed her real estates to be sold, and the net proceeds to form part of her personal estate; but she has not made any gift of that part. As then it is not given away, there is nothing to take it from the heir." In *Taylor v. Taylor*,² Lord Chancellor Cranworth said: "The law gives the estate to the heir notwithstanding the direction of the testator, unless the testator makes a valid devise of it otherwise. Of course I do not mean to say that a testator might not so dispose of the proceeds of real estate as to make it go to the next of kin. . . . In that case the next of kin would take, because there would be an express gift to them by the testator, but not as an interpretation of words of direction, such as we have here." In the cases cited in the note,³ in which it was also held that the testator's land was converted in equity into money by the will, and, therefore, that the heir took as money that portion of the land the produce of which was not disposed of, if the first proposition is correct, the second necessarily follows.

Upon the whole, therefore, it may now be considered as clear, upon authority as well as upon principle, that it is not possible for a testator so to convert his land into money by will, that upon his death it will devolve, by operation of law, upon his personal representative or next of kin, and, therefore, Mr. Scott's admission, in *Ackroyd v. Smithson*, "that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives,"⁴ is no longer true in its full extent.⁵ It is still true, however, upon authority,

¹ 16 Sim. 124, 129.

² 3 De G. M. & G. 190, 197.

³ *Hatfield v. Prime*, 2 Coll. 204; *White v. Smith*, 15 Jur. 1096; *Taylor's Settlement*, *In re*, 9 Hare 596; *Bagster v. Fackerell*, 26 Beav. 469; *Wilson v. Coles*, 28 Beav. 215; *Attorney General v. Lomas*, L. R. 9 Exch. 29; *Hamilton v. Foot*, Ir. R. 6 Eq. 572; *Richerson*, *In re*, [1892] 1 Ch. 379. For comments on the foregoing cases, see *infra*, p. 26.

⁴ See *supra*, p. 7.

⁵ And yet, as late as 1833, Sir John Leach, M. R., in *Jessopp v. Watson*, 1 Myl. & K. 665, says (674): "A testator may, if he pleases, direct that the produce of his real estate which he orders to be sold, shall, in all events and for all purposes, be considered as if it had been personal estate at his death."

that a testator may by his will convert his land into money, not merely for the purposes of his will, but "out and out," though the consequence of his so doing will not be the same as formerly, *i. e.*, instead of causing the land to devolve upon the personal representative, its only effect will be to cause the heir to take as money so much of the land as descends to him. It may be added that, as it is no longer true, even upon authority, that a testator can so convert his land by will as to cause it to devolve, by operation of law, upon his personal representative, so it ought to be no longer true, upon authority, that a testator can so convert his land into money by will as to cause it to devolve, by the same will, as personal estate, unless it appears on the face of the will that the testator intended "personal estate" to include the produce of land directed by the will to be sold.¹

That it is still true, upon authority, though not upon principle, that a testator may by his will convert his land into money "out and out," — a slight glance at the authorities will sufficiently prove. Thus in *Berry v. Usher*,² decided twenty-five years after *Ackroyd v. Smithson*, Sir W. Grant, M. R., said: "If the character of personal estate was imposed upon the real estate to all intents and purposes, the mere appointment of an executor would be sufficient to carry that property to him, either for his own benefit, or as trustee for the next of kin." This shows that that learned judge then held the law to be as it was admitted to be by Mr. Scott in *Ackroyd v. Smithson*; and *Wright v. Wright*³ shows that he still held the same opinion four years later. And yet the opinion thus expressed seems to be inconsistent with the decision of Lord Eldon, in *Sheddon v. Goodrich*,⁴ made more than two years before *Berry v. Usher* was decided. So also in *Hill v. Cock*,⁵ decided in 1813, Lord Eldon, in holding that the heir, and not the next of kin, was entitled to the undisposed of produce of land directed by the testator to be sold, treated the question as being purely one of intention, notwithstanding his own decision in *Sheddon v. Goodrich*, and Sir W. Grant's decision in *Hooper v. Goodwin*.⁶ In Attorney General

¹ See 18 HARV. L. REV. 97-101.

² 11 Ves. 87, 91.

³ 16 Ves. 188.

⁴ 8 Ves. 481.

⁵ 1 Ves. & B. 173.

⁶ For some reason which I have been unable to discover, *Sheddon v. Goodrich* and *Hooper v. Goodwin* have exerted much less influence over subsequent decisions upon equitable conversion than, as it seems to me, they ought to have exerted. They have seldom been cited to prove that a testator cannot by his will so convert his land

v. Holford,¹ decided in 1815, where a testator devised an interest in land in trust to be sold for purposes which wholly failed, the court held that there was a conversion of the land "out and out," and yet that it did not devolve in equity upon the personal representative, but upon a residuary devisee, who, however, took it as personal estate, Thomson, C. B., saying, if such devisee had died immediately after the testator, the land would have gone to his personal representative. In *Bunnett v. Foster*² Lord Langdale, M. R., said: "There is no sufficient reason for holding that a conversion out and out was intended. Unfortunately this is a very vague expression. But the case of the heir does not require it to be laid down that there can in no case be a conversion, except for the purposes of an express trust. It is sufficient to say no intention is shown to convert for any other purposes than those specifically pointed out, and

into money as to cause it to devolve by operation of law upon his personal representative; and yet they seem to me to constitute the only proof of that proposition of which the courts could avail themselves consistently with the views upon equitable conversion to which they have constantly adhered. Nor is either of these cases cited once by Jarman in his chapter on equitable conversion. 1 Jarman, 1st ed., c. xix.

While reading the proof of this article, a reason has occurred to me why *Sheddon v. Goodrich* and *Hooper v. Goodwin* have been so little cited in connection with equitable conversion, namely, that the courts never held that equitable conversion created by will took effect prior to the testator's death (see *Beauclerk v. Mead*, *supra*, p. 1, n. 3), and, therefore, the decisions in *Sheddon v. Goodrich* and *Hooper v. Goodwin* respectively threw no new light upon the question when such conversions take effect. In fact, my difficulty arose from my not applying here what I said at the beginning of this article, when attempting to explain the theory upon which the courts held, prior to *Ackroyd v. Smithson*, that land converted in equity into money by will, devolved, at the testator's death, upon his executor, if not otherwise disposed of, namely, not because they supposed the conversion took effect prior to the testator's death, but because they erroneously assumed that the conversion consisted in a fictitious transmutation of the land into money by equity itself, and hence they concluded that the testator's heir or devisee, on whom the land devolved at the moment of the testator's death, became, at the same moment, a trustee for his executor. See *supra*, p. 3.

If the courts had borne in mind from the beginning that what a testator does, when he is said to convert his land into money by will, is to direct the land to be exchanged for money, at the same time creating in some person a right to have the exchange made by giving him some of the money to be received in exchange, or some interest in such money, and that the equitable conversion is coextensive only with the right or rights so created, the view which prevailed prior to *Ackroyd v. Smithson* could never have come into existence, and if Lord Thurlow, when he decided *Ackroyd v. Smithson*, instead of temporizing as he did, had exposed and rooted out the misconception and error upon which the then existing view was founded, he would have rendered an incalculable service to the English-speaking world.

¹ 1 Price 426.

² 7 Beav. 540, 543.

which have failed." In *White v. Smith*¹ a testator devised land in trust for his son for life, and then in trust for sale, the proceeds, after payment of legacies, to be invested, and the income to be applied to the maintenance of the children of said son, each child to receive his share at twenty-one; and the son having died unmarried, and the land not having been sold, Knight-Bruce, V. C., declared the trust for sale to be absolute and unconditional, and hence the land to be converted into money in equity, without reference to the disposition of the proceeds of the sale, and, therefore, the heir took the same as money. In *Wall v. Colshead*,² a testator devised life estates in certain lands, at the termination of which he devised the same to his executors to be sold, and the proceeds, divided among the children of the tenants for life,—who, however, died without issue, and the court held that the land was converted into money "out and out," and, therefore, though it went to the testator's residuary devisees,³ yet they took it as money. Knight-Bruce, L. J., said: "I think the trust for sale was not conditional but absolute." Turner, L. J., said: "The question is whether the testator intended a conversion out and out, or only for the purpose of division between the children of the tenants for life. On the death of a tenant for life, leaving children, all of whom were under twenty-one, the trust for sale would arise, though the shares of the children would not be indefeasibly vested. By the clause immediately following the residuary gift in the will, if a tenant for life died under twenty-one, there was to be a sale for the benefit of other persons than the children of the tenant for life so dying. Therefore the testator has shown that he did not intend to limit the conversion to the case of there being children of the tenant for life of each property, and the trust for conversion not being limited to that event, I do not see how to limit it." It will be seen, therefore, that the court treated the question whether the conversion was "out and out" or only for the purposes of the will, as depending entirely upon the testator's intention as to the circumstances under which the property should be sold. Lastly, in *Attorney General v. Lomas*,⁴ where a testator devised his lands to trustees in trust to be sold, but the purposes of the sale failed, the court held that the trust for sale was absolute, whether any effective disposition was made of the proceeds of the

¹ 15 Jur. 1096.

² 2 De G. & J. 683, 688, 689.

³ See comments on *Attorney General v. Holford*, *infra*, p. 27.

⁴ L. R. 9 Exch. 29.

sale or not, *i. e.*, that the land was converted into money "out and out," and, therefore, though it went to the heir, she took it as money.

What, then, are the changes which the authorities show to have taken place, in respect to the equitable conversion of land into money by will, since *Ackroyd v. Smithson* was decided?

1. As to what constitutes such equitable conversion there has been no change. It is, and always was held that the equitable conversion of land into money by will is caused by the declared intention of the testator to have his land sold after his death; and this intention may be declared by directing something to be done with the land which will render a sale of it necessary.

2. Prior to *Ackroyd v. Smithson* evidence of such intention seems to have been looked for only in such directions as the will contained respecting a sale of the land, and the mode of dealing with and managing the proceeds of the sale prior to, or independent of, any gift of the latter, while, since *Ackroyd v. Smithson* was decided, such evidence has been primarily looked for in the gift or gifts which the testator makes of the proceeds of the sale; and, as evidence of an intention to have the land sold, a gift which does not take effect is regarded as no gift.

3. In the absence of evidence to the contrary it will be presumed that the testator intended to have so much only of the land sold as his effective gifts of the proceeds of the sale shall render necessary, and hence so much of the land only will be converted in equity, — a rule, however, which had no existence prior to *Ackroyd v. Smithson*.

4. Prior to *Ackroyd v. Smithson*, as no attention was paid to a testator's purpose or object in directing a sale of his land, and hence a direction to sell for one purpose was treated as a direction to sell for all purposes, so a direction to sell for any purpose was regarded as causing an equitable conversion for all purposes. Since *Ackroyd v. Smithson*, however, the doctrine has become established that an equitable conversion by will is presumptively coextensive only with the purposes for which the sale is directed, and hence the distinction has become established between an equitable conversion for the purposes of the will only, and an equitable conversion "out and out"; and as the presumption is that a testator intends the land to be sold only for the purposes which he expresses in his will, so the presumption is that he intends to create an equitable conversion for the purposes of his will only.

5. It has always been held that a direction by a testator in his will to sell his land at all events will be valid and binding, whether he make a gift of the proceeds of the sale, or of any part thereof, or any interest therein, or not. While, however, prior to *Ackroyd v. Smithson* any unqualified direction to sell was presumed to be a direction to sell at all events, since that case such a direction is presumed to be a direction to sell only for the purposes expressed in the will, *i. e.*, only to such extent as the gifts which are made of the proceeds of the sale shall render necessary, and hence to cause an equitable conversion only to the same extent.

6. While it has always been held that a testator could by his will require his land to be sold at all events, and could thus convert it into money in equity "out and out," yet a conversion "out and out" has meant less since *Ackroyd v. Smithson* than it did before; for, while such a conversion before *Ackroyd v. Smithson* caused any portion of the land the produce of which was not disposed of, to go to the testator's personal representative, it now has merely the effect of causing the heir to take the same as money.

7. But, while the authorities clearly show that the effect produced by a conversion of land into money in equity has undergone the change indicated in paragraph 6, they give no satisfactory reason for such change, though the true reason seems to be that the courts now recognize the fact, as they did not prior to *Ackroyd v. Smithson*, nor till long afterwards, that an equitable conversion of land by will can never come in time to intercept the descent of the land to the testator's heir.

8. The authorities show that, except so far as the contrary is indicated in paragraph 7, the intention of the testator is still as supreme in respect to equitable conversions by will as it ever was, and I am, therefore, now prepared to give an answer to the question with which my last article concluded,¹ namely, what is, upon authority, the measure of the extent of the equitable conversion of land into money caused by a will? And the answer is that the only measure of such a conversion is the intention of the testator as to the sale of the land; for it is held that a testator can by his will convert his land into money without making any gift of the proceeds of the sale of such land, and consequently without creating any right in anyone to have the land sold, and though a sale of the land will leave the ownership of the proceeds of the sale where the ownership of the land was when the sale was made.

¹ See 18 HARV. L. REV. 270.

9. In spite of what is said in paragraph 8, it has always been assumed, and within a recent period has been held,¹ that a direction to sell is a *sine qua non* of every equitable conversion of land by will. Moreover, it has always been held that a conditional direction to sell land can cause no equitable conversion until the condition is satisfied;² and the same is true of a direction to sell which is not intended to be imperative,³ *i. e.*, that it can cause no equitable conversion. A testator may, however, make his direction to sell his land as absolute and as imperative as he pleases, and yet, if he makes no gift of the proceeds of the sale, his direction to sell cannot be enforced; still less can it be specifically enforced. In short, we are told that a trust for sale is a *sine qua non* of every equitable conversion by will, and yet that there need be no *cestui que trust*, nor any power of enforcing the trust. It would seem, therefore, that the courts would have been more consistent if they had held intention alone to be sufficient to create an equitable conversion by will, though, in that case, consistency would be the only virtue that could be attributed to them.

10. On the whole, if regard be had to authority alone, the differences between the law as it stands to-day and as it stood prior to *Ackroyd v. Smithson* in respect to equitable conversion by will, are much less than they have generally been supposed to be; nor ought this to be a matter of surprise to anyone who reflects that neither the counsel for the successful party in *Ackroyd v. Smithson*, nor the judge who decided that case, founded their argument upon anything else than the intention of the testator and the existing authorities.

Nothing has hitherto been said as to the influence exerted by *Ackroyd v. Smithson* upon the equitable conversion of money into land by will, and not much need be said. The question whether the change effected by *Ackroyd v. Smithson*, as to the conversion by will of land into money, should be extended by analogy to the equitable conversion by will of money into land, arose, for the first

¹ *Hyett v. Mekin*, L. R. 25 Ch. D. 735.

² *Taylor's Settlement*, *In re*, 9 Hare 596; *Hardy*, *Ex parte*, 30 Beav. 206; *Raw*, *In re*, L. R. 26 Ch. D. 601.

³ *Stamper v. Millar*, 3 Atk. 212; *Doughty v. Bull*, 2 P. Wms. 320. It seems to have been generally supposed that a conditional direction to sell land, or a direction which is not intended to be imperative, does not cause an equitable conversion because it does not show an intention to have a sale made at all events; but the true reason seems to be that such a direction creates no right to have a sale made, and imposes no obligation to make a sale.

time, fifty-six years after *Ackroyd v. Smithson* was decided,¹ in the case of *Cogan v. Stevens*,² and was decided in the affirmative by Sir C. C. Pepys, M. R. (afterwards Lord Cottenham), notwithstanding an apparent decision to the contrary³ by Lord Somers and the House of Lords; and his decision has since been followed.⁴

As the cases cited in this article have been considered almost wholly from the point of view of authority, it may not be out of place to make a few remarks upon some of them from the point of view of what is conceived to be principle. Thus, in *Ackroyd v. Smithson*, there was, upon principle, no equitable conversion of that portion of the land the produce of which was intended for the two deceased legatees, as there was no one who had a "right" to have that portion of the land sold, and to receive the proceeds of its sale; nor can there ever be an equitable conversion in favor of the person who makes such conversion, or in favor of his heir as such. Therefore, that portion of the land descended in equity, at the testator's death, to his heir, in whose hands it was land until its actual sale, when it became money for all purposes.⁵ The same is also true in *Robinson v. Taylor*,⁶ and *Williams v. Coade*.⁷ In *Wright v. Wright*,⁸ also, there seems to have been no equitable conversion, except, possibly, in favor of the testator's wife for her life, and, therefore, the land ought to have been held to have descended in equity, at the testator's death, to his heir, subject to the testator's debts and to the life interest of his wife. In *Smith v. Claxton*,⁹ there was, for the reason already stated, no equitable conversion as to the testator's heir as such, and, therefore, it was erroneously held that he took as money the one-half of the land secondly devised as to which the purpose of the devise had failed. In *Hill v. Cock*¹⁰ it seems there was no equitable conversion, the land having merely been charged with debts and legacies.¹¹ The

¹ This may serve to remind the reader that, since *Ackroyd v. Smithson*, equitable conversions by will of money into land have been infrequent, as compared with equitable conversions of land into money.

² 1 Beav. 482, n. See also *supra*, p. 5, n. 1.

³ *Fletcher v. Chapman*, 3 Bro. P. C., Tomlin's ed., 1.

⁴ *Reynolds v. Goodlee*, John. 536, 582; *Curteis v. Wormald*, 10 Ch. D. 172. See also, 18 HARV. L. REV. 14-19.

⁵ See 18 HARV. L. REV. 5, 6.

⁶ 2 Bro. C. C. 589; and see 18 HARV. L. REV. 6.

⁷ 10 Ves. 500.

⁸ 16 Ves. 188.

⁹ 4 Madd. 484.

¹⁰ 1 Ves. & B. 173.

¹¹ I shall hereafter endeavor to show that a direction to sell land, whether by will or

same is also true of *Maugham v. Mason*,¹ except that the land was there charged with legacies only. In *Attorney General v. Holford*,² the correct view would seem to have been that as all the purposes of the sale failed, the trust for conversion also failed, and, as there was no equitable conversion of the land, that consequently the equitable ownership of the land, the legal ownership of which vested in the trustees, either descended to the heir, or passed to the residuary devisee. Under no circumstances can a residuary devisee, as such, acquire a right to have land sold, and to receive the proceeds of the sale, or any part of such proceeds.³ In *Jessopp v. Watson*⁴ there was no equitable conversion, as the purposes of the sale all failed, except the payment of debts, legacies, and annuities, and the latter constituted a mere charge.⁵ For the other reasons already given also, there was no equitable conversion as to the testator's heir, and, therefore, the latter took the land as land. In *Phillips v. Phillips*⁶ it was erroneous to hold that the one-fifth of the land the produce of which was intended for the deceased brother, went to the testator's next of kin; if for no other reason, because there was no equitable conversion of that portion of the land. The same is also true, *mutatis mutandis*, of *Fletcher v. Chapman*.⁷ In *Flint v. Warren*⁸ it seems clear that there was no equitable conversion of the land into money, as the will merely charged the land with the payment of the testator's debts and legacies in aid of the personal estate, and it appeared that the latter was abundantly sufficient to pay them all.⁹ In *Shallcross v. Wright*,¹⁰ also, the land was merely charged with debts and legacies, and, therefore, there was no equitable conversion of it into money. In *Hatfield v. Prime*¹¹ the testator's heir took as land that portion of the land the produce of which had not been effectively disposed of, there having been no equitable conversion of it into money, nor, indeed, any equitable conversion of any of the land as to the testator's heir. In *Wilson v. Coles*¹²

by deed, for the mere purpose of satisfying a charge or charges thereon, never causes an equitable conversion. And see 18 HARV. L. REV. 83-93.

¹ 1 Ves. & B. 410. See also 18 HARV. L. REV. 20, n. 3.

² 1 Price 426.

³ See 18 HARV. L. REV. 94, 95.

⁴ 1 Myl. & K. 665.

⁵ See *supra*, p. 26, n. 11.

⁶ 1 Myl. & K. 649.

⁷ 3 Bro. P. C., Tomlin's ed., 1.

⁸ 14 Sim. 554; 16 Sim. 124.

⁹ See *supra*, p. 26, n. 11.

¹⁰ 12 Beav. 505. See also *supra*, p. 26, n. 11.

¹¹ 2 Coll. 204.

¹² 28 Beav. 215.

there was no equitable conversion of the land, except as to the wife, and even, as to her, there was an equitable conversion for her life only. On the testator's death, therefore, the land immediately descended to his two co-heirs, subject to the wife's life estate, and when one of the co-heirs died, her share went to her heir, and was land in the hands of the latter until its actual sale, when it became money for all purposes.¹ In *Attorney General v. Lomas*,² no right was created in any one to have the land sold, and, therefore, there could be no equitable conversion. Nor could there be any equitable conversion in favor of the testator's heir, even if there were one in favor of others. In *Hamilton v. Foote*³ the testator's land descended at her death to her heir, subject only to the life estate devised to the testator's sister, and to the two legacies of £500 each. There was no equitable conversion of any of the land as to any person, nor could any of the land be sold, if the heir chose to pay the two legacies, nor could any more be sold, under any circumstances, than enough to pay those legacies. In *In re Richerson*⁴ there was no equitable conversion of the testator's land, except as to the tenants for life respectively, and, even as to them, only to the extent of their respective life interests. At the testator's death, therefore, the land descended to his sister and heir, subject, however, to the life interests and to the right of the respective tenants for life to have the land sold. As to so much of the land as was actually sold between the testator's death and the death of the sister, the latter's title to the land was divested by the sale, she acquiring a title to the purchase-money instead, and, on the death of the sister, so much of the land as remained unsold descended to her heir, and the produce of what had been sold devolved upon her personal representative, and, as to so much of the land as was sold between the sister's death and the death of the surviving tenant for life, the title of the sister's heir to the land was divested, and he acquired a title to the purchase-money instead. In *Wall v. Colshead*,⁵ the purposes of the sale having all failed, there was no equitable conversion of the land, and the latter passed, at the testator's death, to his residuary devisees, who took it as land, though subject to the life interests of the tenants for life. So also, in *White v. Smith*,⁶ the purposes of the sale all failed, and

¹ See 18 HARV. L. REV. 6.

² IR. R. 6 Eq. 572.

³ 2 DE G. & J. 683. See also *supra*, p. 22.

⁴ 15 JUR. 1096. See *supra*, p. 22.

⁵ L. R. 9 EXCH. 29.

⁶ [1892] 1 CH. 379.

hence the land descended to the testator's heir, who took it as land, though subject to legacies. In *In re Taylor's Settlement*,¹ a testator devised his land in trust to be sold, and its produce divided among his seven children, and one of the children having died before the testator, it was properly held that the one-seventh of the land, the produce of which was intended for the deceased child, went to the testator's heir, but improperly held that the latter took it as money.²

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¹ 9 Hare 596. *Bagster v. Fackerell*, 26 Beav. 469, is subject to the same observations as *Taylor's Settlement*, *In re*. In that case, however, it would seem, from the length of time that had elapsed since the testator's death, that the land must have been actually sold, — in which case, of course, the heir would take the money as money. Compare also *Ackroyd v. Smithson*, *supra*, p. 26, and *Smith v. Claxton*, p. 26.

² In *Clarke v. Franklin*, 4 Kay & J. 257, where a trust for converting land into money was created by deed, but all the purposes of the trust failed *ab initio*, except the payment of six sums of 50*l.* each, and one sum of 20*l.*, to persons named, it was held that the equitable interest in the land resulted immediately to the grantor, subject only to the payment of those seven sums, but that the same was money in his hands, the land being converted into money in equity the moment that the deed was delivered. It was, therefore, held that the grantor, by directing the land to be sold, *i. e.*, exchanged for money, had immediately converted it into money, so that it became money in his own hands. This, however, was not merely a complete non-sequitur, *i. e.*, a thing which did not in the least follow from the direction to sell the land, but it was a legal impossibility. On the delivery of the deed the legal title to the land passed to the trustee, the equitable interest remaining in the grantor; and at the same moment, according to the decision, there was a transmutation of this equitable interest from land into money. Such a transmutation could be made, however, only by equity itself, and equity could make it only for an adequate cause, and it was not pretended that any cause existed. Moreover, such a transmutation would be entirely independent of the direction to sell the land, and inconsistent with it. It may be added that the seven persons, each of whom was to receive a small sum out of the proceeds of the sale, had nothing to do with the equitable conversion, having merely a charge on the land, for the amounts coming to them respectively.

PATENTABLE PROCESSES.

THE law of patents is purely statutory. In this country the right of an inventor to a patent or grant, by which alone this species of property is created, depends entirely upon the provisions of the acts of Congress, passed pursuant to its constitutional power,¹ as interpreted by the decisions of the federal courts.²

Under this power Congress can grant a patent only to an inventor, and to him only for his own discovery and for a limited time; but, subject to these limitations, its power to legislate upon the subject of patents is plenary, and it may refuse all privileges whatsoever or bestow them for such classes of inventions and on such conditions as it may be pleased to prescribe.³

A process, by that name, never has been made the subject of a patent in any of our statutes. But every patent act has made provision for the grant of a patent to any one who has invented or discovered any new and useful "art," as well as "machine, manufacture, or composition of matter," or any new and useful improvement thereof; and a process, it is well settled, is included under the general term "useful art," or rather is an art, the two terms being practically synonymous.

As defined by Mr. Justice Bradley, speaking for the Supreme Court in the case of *Cochrane v. Deener*,⁴ "A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

¹ Art. I. § 8, clause 8.

² *Brown v. Duchesne*, 19 How. (U. S.) 183, 195.

³ *Blanchard v. Sprague*, 3 Sumn. (U. S. C. C.) 535, 541; *McClurg v. Kingsland*, 1 How. (U. S.) 202, 206.

⁴ 94 U. S. 780, 788.

This definition was further elaborated by the same distinguished judge in *Tilghman v. Proctor*,¹ where, after reviewing several prior decisions, he quotes, from the opinion of Mr. Chief Justice Taney in the case of *O'Reilly v. Morse*,² the statement that "Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means," and declares that this clear and exact summary of the law affords the key to almost every case that can arise. "But," he explains, "everything turns on the force and meaning of the word 'means.' It is very certain that the means need not be a machine, or an apparatus; it may, as the court says, be a *process*. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye, — an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result." It is only where apparatus is required and is not sufficiently obvious to suggest itself to a person skilled in the particular art, that the patentee of a process is required to describe some apparatus by which it can be practically carried out.³

In the Telephone Cases,⁴ which involved the patentability of Bell's claim for a method of, and apparatus for, transmitting vocal or other sounds telegraphically, "by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds," the court held, in an opinion written by Mr. Chief Justice Waite, that Bell had both discovered a new art and invented a machine by which it could be practiced and so made useful; and that the law unquestionably gave him the right to a patent therefor — as discoverer, for the art or process of transmitting speech he had found, and as inventor, for the means he had devised to make his discovery one of actual value. The court again observed that a patent for an art does not necessarily involve a

¹ 102 U. S. 707, 728. This case was decided by a unanimous court, after most careful consideration, and reversed a prior decision upon the same patent, in *Mitchell v. Tilghman*, 19 Wall. (U. S.) 287, where it was held, Justices Swayne, Strong, and Bradley dissenting, that the patent was limited to a process practiced by means of the particular apparatus pointed out in the specification, and, as so limited, had not been infringed.

² 15 How. (U. S.) 62.

³ Approved and applied in *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 427.

⁴ 126 U. S. 1, 532.

patent for the particular means employed for using it, the mention of any means being necessary only to show that it can be made of use.

Of the processes involved in the above cases and therein held patentable as "arts," Bell's consisted in so using and controlling electricity, a force of nature, as to make it accomplish the purpose in view; Tilghman's process was of a chemical nature; and Cochran's was, apparently, a purely mechanical process.¹ Other process patents which came before the Supreme Court for adjudication, covering a wide range of arts, were either sustained,² or were held invalid on other grounds or not infringed,³ without any discussion or question of the patentability of the processes as such.⁴

Indeed, the language used by the court in defining the term "process," as quoted above, is broad enough to include all acts or modes of acting by which a given subject-matter is transformed into a different state or thing; and certainly the statute⁵ makes no distinction between different classes of processes, but declares "any" new and useful art — that is to say, process — patentable,

¹ "The hereinbefore described process for manufacturing flour from the meal of ground wheat, by first taking out the superfine flour, and then taking out the pulverulent impurities by subjection to the combined operations of screening and blowing and afterward regrinding and rebolting the purified middlings."

² *Mowry v. Whitney*, 14 Wall. (U. S.) 620; *Klein v. Russell*, 19 Wall. (U. S.) 433; *The Wood Paper Patent*, 23 Wall. (U. S.) 566; *Eames v. Andrews*, 122 U. S. 40; *Lawther v. Hamilton*, 124 U. S. 1; *Topliff v. Topliff*, 145 U. S. 156; *Hoyt v. Horne*, 145 U. S. 302.

³ *McClurg v. Kingsland*, 1 How. (U. S.) 202; *Brown v. Piper*, 91 U. S. 37; *Sewall v. Jones*, 91 U. S. 171; *Merrill v. Yeomans*, 94 U. S. 568; *Vinton v. Hamilton*, 104 U. S. 485; *Heald v. Rice*, 104 U. S. 737; *Packing Company Cases*, 105 U. S. 566; *Manning v. Glue Co.*, 108 U. S. 462; *Downton v. Milling Co.*, 108 U. S. 466; *Western Electric Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447; *Miller v. Foree*, 116 U. S. 22; *Plummer v. Sargent*, 120 U. S. 442; *Dreyfus v. Searle*, 124 U. S. 60; *Mosler Safe & Lock Co. v. Mosler*, 127 U. S. 354; *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151; *Bene v. Jeantet*, 129 U. S. 683; *Marchand v. Emken*, 132 U. S. 195; *Commercial Mfg. Co. v. Fairbank Co.*, 135 U. S. 176; *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55; *Ansonia Co. v. Electrical Supply Co.*, 144 U. S. 11; *Royer v. Coupe*, 146 U. S. 524; *Weatherhead v. Coupe*, 147 U. S. 322; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623; *Leggett v. Standard Oil Co.*, 149 U. S. 287.

⁴ Attention should also be called to another line of cases in which patents originally granted for machines had been reissued with claims for processes and the reissues were held invalid on the ground that they covered different inventions from those of the original patents. See *Burr v. Duryee*, 1 Wall. (U. S.) 531; *Fuller v. Yentzer*, 94 U. S. 288, 299; *James v. Campbell*, 104 U. S. 356; *Heald v. Rice*, 104 U. S. 737; *Wing v. Anthony*, 106 U. S. 142; *Eachus v. Broomall*, 115 U. S. 429; *White v. Dunbar*, 119 U. S. 47.

⁵ Rev. Stats. § 4886.

provided, of course, it amounts to a discovery or involves an act of invention.

But, in 1895, in a unanimous opinion written by Mr. Justice Brown in the case of *Risdon Locomotive Works v. Medart*,¹ the court announced as an established rule of law the doctrine that while certain processes of manufacture were clearly patentable it was equally clear that certain others were not; and stated that, although the distinction between them was nowhere accurately defined, it might be said in general that processes which involved chemical or other similar elemental action were patentable, though mechanism might be necessary in their application or use, while those which consisted solely in the operation of a machine were not patentable, since such processes were purely mechanical and entirely independent of any chemical or other similar action.

Following this decision, the lower courts began at once to hold invalid patents for processes the patentability of which had never before been questioned.² The view that patentability had been denied to all merely mechanical processes was so widely entertained, and affected the validity of such a large class of process patents, that the court, again speaking by Mr. Justice Brown, seized upon the occasion shortly afterwards presented in the case of *Westinghouse v. Boyden Power Brake Co.*,³ to explain its prior decision by stating that, while it had there been assumed, although not expressly decided, that a process to be patentable must involve a chemical or other similar elemental action, it might still be regarded as an open question whether the patentability of processes extended beyond this class of inventions. And it added: "Where the process is simply the function or operative effect of a machine, the above cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, . . . there are cases to the effect that such a process is patentable, though none of the powers of nature be invoked to aid in producing the result."⁴

¹ 158 U. S. 68.

² See, for instance, *Travers v. American Cordage Co.*, 64 Fed. Rep. 771, and *Travers v. Hammock & Fly Net Co.*, 78 Fed. Rep. 638, the first decided before, and the second shortly after, the opinion in the *Locomotive Works Case* was handed down.

³ 170 U. S. 537, 556.

⁴ Citing *Eastern Paper Bag Co. v. Standard Paper Bag Co.*, 30 Fed. Rep. 63; *Union Paper Bag Mach. Co. v. Waterbury*, 39 Fed. Rep. 389; and *Travers v. American Cordage Co.*, 64 Fed. Rep. 771.

The uncertainty and confusion in which the whole subject of patentable processes is left by these two recent cases — and it has not been removed by any later decision of this court — is apparent. Does a given process involve a chemical or other similar elemental action, and what is to be included in this alternative term? What is meant by function or operative effect of a machine, and when is a process simply such a function or effect? And is, or is not, a process patentable where it does not invoke the aid of any power of nature, but can be performed by simple manipulation, although better performed by machinery? These are questions which will arise and must be answered — and the answers, as intimated by the court in the *Locomotive Works Case*, will necessarily be veiled in an obscurity similar to that which clouds the line of demarcation between mechanical skill and invention — if this doctrine, that only certain classes of processes, vaguely defined at best, are patentable, is, or is to become, the established rule in the law of patents.

The subject is of such practical importance, and the effect of any unnecessary confusion is so deplorable, as to justify a critical examination of the situation, to determine whether the doctrine is sound in principle, and, if not, to what extent the Supreme Court has bound its future action by its past decisions.

Every article of human contrivance, whether a machine, manufacture, or composition of matter, is the product and necessarily involves the practice of some process, — the performance of some act, or series of acts, by which the raw or partly manufactured products of nature are fashioned or united to make the article in question. Indeed, all natural products result from processes in which their elements coact, in accordance with natural laws, or are acted upon by the powers of nature.

A machine, itself an article of manufacture, is simply a means for performing the acts by which some other manufacture, whether another machine or the ultimate article designed for consumption, is produced.

In an abstract sense, therefore, the function of a machine may be said to be the production of the manufactured article for the making of which it was designed. More concretely, the function of every machine is to perform some definite process — some act, or series of acts — upon a material object, by which it is transformed into a different state or thing. It follows that this process is not simply the function of the machine. The two are entirely distinct

entities. The one, as stated by Mr. Justice Bradley in the *Tilghman Case*, "is a conception of the mind, seen only by its effects when being executed or performed." The other is the production of those physical effects upon a material object. For example, in the case of the simple process of making paper bags, the acts of folding first in one way and then another, which constitute the process, can easily be conceived, wholly apart from the piece of paper to be acted upon; but the function or operative effect of a paper bag machine can be realized only when the paper is actually subjected to the action of the machine. In this case, moreover, it is apparent that the process is something different from, and more than, the function of the machine, because it can also be performed without the aid of any machine. It is only where a process can be performed in no other known way than by a particular machine that difficulty is experienced in distinguishing between it and the function of the machine. But the distinction is none the less real. "The difficulty," as pointed out by Professor Robinson,¹ "is another form of the old confusion between the end and the means, and is to be avoided by defining sharply the end to be accomplished, and determining whether the machine or the operation performed by it is the actual means." The acts which constitute the process are, primarily, the means for attaining the end in view. The machine, as already stated, is simply a means for performing the process; and that is its function or operative effect. It is always possible that a different machine, or other means, may be devised for performing this operation. Thus, Bell's method of transmitting vocal sounds telegraphically is not simply the function of the crude apparatus by which he reduced his process to practice.

In the natural course of development, many processes of manufacture are first performed by hand, then partly by machinery and partly by hand, and, finally, automatically, by a machine. For others, machines have not yet been devised; and such processes must be performed wholly or in part by hand. Still other processes are beyond the power or skill of the hand, and must be performed, if at all, by a machine. But, however carried into effect, the process is still a process; and it matters not whether it was first practiced by hand, or was discovered and reduced to practice only in connection with the development of a machine. It does not cease to be such because it is, or must be, performed

¹ 1 Robinson on Patents, § 172, note 2; see, also, §§ 144-146, 167.

by mechanical means. Even when a process seems inseparably identified with a particular machine, as the only known means by which it can be carried into effect, its inventor is entitled to a patent for the process as well as for the machine; and it is only by such a patent that his whole invention is secured to him against all possible contingencies.¹

The useful arts are no less promoted by the inventor who discovers a simple manipulative process than by one who discovers a new chemical process. Congress, therefore, has the same constitutional power to secure his discovery, for a limited time, to the one inventor as to the other; and in the exercise of this power, as already stated, it has never made any distinction between mechanical and other processes. The provision of the Patent Act is broad enough to cover all processes alike, the only qualifications being that the process shall have been invented or discovered, and be new and useful.

With these preliminary observations we will pass to the consideration of the basis for, and the limitations of, the doctrine, which

¹ Curtis, *Law of Patents*, 4th ed. § 14, note. — "A process may be altogether new, whether the machinery by which it is carried on be new or old. A new process may be invented or discovered, which may require the use of a newly invented machine. In such case, if both the process and the machine were invented by the same person, he could take separate patents for them. A new process may be carried on by the use of an old machine, in a mode in which it was never used before. . . . In such a case, the patentability of the process in no degree depends upon the characteristic principle of the machine, although machinery is essential to the process, and although a particular machine may be required."

¹ Robinson on Patents, § 172, note 2. — "If the operation performed by the machine is new in reference to the object upon which it is employed, a new process has been invented; and this is no less true if the machine or instrument employed is new than if it were old, or if the process can be performed in no other known way than by this particular machine. While, on the other hand, if the operation is known in reference to the object, the invention of a new machine for performing it does not make a new process, but only a new instrument for applying it. . . . Whether or not a new machine is the reduction to practice of a new process, or is a new instrument for the performance of an old process, is, therefore, to be determined by the state of the art at the date of the invention. If it is the former, the process is patentable, though the machine be new. If the latter, only the machine can be allowed the protection of the law."

Tilghman v. Proctor, 102 U. S. 707, 721. — "Had the process been known and used before, and not been Tilghman's invention, he could not then have claimed anything more than the particular apparatus described in his patent; but being the inventor of the process, as we are satisfied was the fact, he was entitled to claim it in the manner he did."

See *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788, 796.

has been declared to be an established rule of law, that certain processes are not proper subject-matter for a patent.

Wyeth v. Stone,¹ decided by Mr. Justice Story in 1840, is the first case cited in support of this proposition, and is said to show the distinction between patentable and unpatentable processes, and to be the earliest reported case upon that subject. In the patent in suit, the inventor, after describing a horse-machine for cutting ice and its mode of operation, had claimed, as new, the process of cutting ice "of a uniform size, by means of an apparatus worked by any other power than human." This was held to be "a claim for an art or principle in the abstract, and not for any particular method or machinery," and to be "broader than the actual invention of the patentee." But another claim in the specification for the particular apparatus to cut ice, described therein, was sustained as valid. It is difficult to see the bearing of this decision upon the patentability of processes. The question whether the specific acts performed in the operation of Wyeth's machine were patentable as a process, if new, is not even referred to. All that appears to have been decided was, that a patentee could not go beyond his actual invention and have a valid claim for an art or principle in the abstract.

O'Reilly v. Morse,² decided by the Supreme Court in 1853, is to the same effect. After describing and claiming the several parts of his apparatus, Morse made claim, broadly, to "the use of the motive power of the electric or galvanic current . . . however developed, for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power," of which he asserted that he was the first inventor or discoverer. Morse had unquestionably discovered a new process, which might be described as the method of transmitting intelligence to a distance by causing the making and breaking of an electric circuit at one point to produce certain conventional signs at a distant point. But instead of claiming such a process, he made his claim to an art or principle in the abstract — to the use of a power of nature to perform an abstract function or effect an abstract result, regardless of the particular process or apparatus employed; and the court held, correctly, that his claim was "too broad, and not warranted by law," citing

¹ 1 Story (U. S. C. C.) 273, 285.

² 15 How. (U. S.) 62, 112, 117, 119. For a somewhat similar case, where the patentee had failed to claim the process he had invented, see *Le Roy v. Tatham*, 14 How. (U. S.) 156; and s. c., 22 How. (U. S.) 132.

Wyeth *v.* Stone as a case directly in point. Mr. Chief Justice Taney, writing the opinion, points out that, whether the telegraph be regarded as an art or machine, "the manner and process of making or using it must be set forth in exact terms," the act of Congress making no difference in this respect between an art and a machine, and thus, as had always been held, the patent embraced nothing more than the actual improvement described and claimed as new, any one being at liberty to use all methods of accomplishing the same object which differed substantially from the one described.

Corning *v.* Burden,¹ also decided in 1853, is, however, the case principally relied upon, and is the only one of its own decisions cited by the Supreme Court, in the Locomotive Works Case, in support of its position.² The case turned upon the proper construction of the claim of the patent in suit. The declaration averred that the patentee was "the first inventor of a new and useful machine for rolling puddle balls," for which a patent was granted in 1840, and that the defendants had "made, used, &c., this said new and useful machine." The patent itself was entitled, and its specification described, "a new and useful machine for rolling puddle balls and other masses of iron in the manufacture of iron"; but the claim, in rather ambiguous language, was for "the preparing of the puddle balls . . . by causing them to pass between a revolving cylinder and a curved segmental trough adapted thereto, constructed and operating substantially in the manner of that herein described and represented." The court below construed the patent as for a new process and so instructed the jury, who returned a verdict for the plaintiff. On exception to this charge the Supreme Court reversed the judgment and awarded a new trial.³ Mr. Justice Grier, who wrote the opinion, after reciting the facts, introduces an inquiry as to whether the patent was for a process or a machine by the following general statement:

¹ 15 How. (U. S.) 252, 267.

² *Wicke v. Ostrum*, 103 U. S. 461, 469, is also cited, to the same effect, in the Westinghouse Case; but in that case it was held, simply, that while the patentee could not patent "the idea of driving more than one nail at the same time in the manufacture of boxes by the use of machinery," he could claim, as his patent merely did, his contrivance to make that idea practically useful.

³ For other cases in which ambiguous claims have been construed as claims for machines, not processes, see *Burr v. Duryee*, 1 Wall. (U. S.) 531; *Railroad Co. v. Du Bois*, 12 Wall. (U. S.) 47; *Fuller v. Yewtzer*, 94 U. S. 288, 299; *Grier v. Wilt*, 120 U. S. 412; *Dryfoos v. Wiese*, 124 U. S. 32; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158; *Grant v. Walter*, 148 U. S. 547.

"A process, *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations, are called processes. . . . One may discover a new and useful improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to his patent. . . . It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the term process is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. But the term process is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered, or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

Coming then to the case in hand, the learned judge holds that it was by not distinguishing between the primary and secondary sense of the term process, that the court below appeared to have fallen into an error. Burden, he says, did not pretend to have discovered any new process, but only a new machine; and as the patent requested was for a machine, to construe its claim as for the function or effect of that machine would certainly endanger, if not destroy, its validity.

The case, therefore, decided only that the patent must be regarded as a patent for a machine, and that the court below erred in construing it otherwise. It did not call for a decision of, and the attention of the court does not appear to have been directed specifically to, the question of the patentability of a new process

which was purely mechanical and could, perhaps, be performed only by the operation of a machine. And, notwithstanding the fact that some of the expressions used by way of illustration may be given a broader signification, it is believed that the court intended to condemn, as unpatentable, only abstractions — “the function or abstract effect of a machine,” and consequently a process in the “secondary,” “vague,” or “subjective” sense in which that term is sometimes used to represent such abstract function or effect — as distinguished from a process in the primary and only correct sense in which that term was, and has since been, defined as synonymous with an “art”;¹ and the decision seems to have been so understood by the court itself down to the time of the Locomotive Works Case.²

Coming now to *Risdon Locomotive Works v. Medart*,³ we find that the case is based upon a patent — among others — which is, admittedly, “for a process in manufacture, and not for the mecha-

¹ In *Burr v. Duryee*, 1 Wall. (U. S.) 531, 570, decided ten years later, Mr. Justice Grier observes that the patent act does not authorize the grant of a patent “for a ‘principle’ or a ‘mode of operation,’ or an idea, or any other abstraction.” See, also, *Case v. Brown*, 2 Wall. (U. S.) 320.

² The remaining cases cited in the Locomotive Works Case to illustrate processes which are unpatentable are all comparatively recent decisions of the Circuit Courts, and are referred to as follows: “Although the cases are not numerous, this distinction between a process and a function has never been departed from by this court, and has been accepted and applied in a large number of cases in the Circuit Courts. The following processes have been held not to be patentable: An improvement in sewing machines, by which the soles and uppers of boots and shoes could be sewed together without any welt by a certain kind of stitches, *McKay v. Jackman*, 12 Fed. Rep. 615. A process for washing shavings in breweries, *Brainard v. Cramme*, 12 Fed. Rep. 621. For an improved method of treating seed by steam, *Gage v. Kellogg*, 23 Fed. Rep. 891. A process for crimping heel stiffenings of boots and shoes, *Hatch v. Moffitt*, 15 Fed. Rep. 252. See also *Sickles v. Falls Company*, 4 Blatchf. (U. S.) 508; *Excelsior Needle Co. v. Union Needle Co.*, 32 Fed. Rep. 221.” It will be found, however, that every one of these cases was actually decided upon some ground other than the unpatentability of the process. Thus, in *McKay v. Jackman*, it was held that the patentee had invented no new process for forming stitches, but simply had applied an old stitch to a new part of a shoe, and that an earlier patent for the machine covered his whole invention, — in other words, that the process claimed had not been invented by the patentee. *Brainard v. Cramme* and *Hatch v. Moffitt* were decided upon the ground that broad process claims, introduced by reissue into patents for machines years after the original patents had been issued, were void within the decisions relative to reissued patents. And in *Gage v. Herring*, which was also based upon a reissued patent, it was held that this reissue was invalid as being an unlawful expansion of the original patent, or, in any event, had not been infringed. The other two cases to which reference is made are even more remote in their bearing upon the subject in question.

³ 158 U. S. 68.

nism employed, nor for the finished product of such manufacture." In going back to a decision handed down more than forty years before and from expressions of opinion found therein deducing a rule that certain classes of processes are not patentable and applying that rule as it has done, it is thought with all deference that the court itself has fallen into the same error—a failure to distinguish between the primary and secondary meaning of the term process—which, in *Corning v. Burden*, it found to have been made by the lower court. Thus, in the opinion, the general proposition, "That certain processes of manufacture are patentable is as clear as that certain others are not," is first announced; and this is explained by the further statement that, generally speaking, "processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such processes, while those which consist solely in the operation of a machine are not," the operation then being "purely mechanical." Next, after reviewing two English cases and its own decisions in *O'Reilly v. Morse*, *Mowry v. Whitney*, *Cochrane v. Deener*, *Tilghman v. Proctor*, *New Process Fermentation Co. v. Maus*, and the *Telephone Cases*, and observing that, in all these cases, the process sustained was either a chemical one, or consisted in the use of one of the agencies of nature for a practical purpose, it prefaces its reference to *Wyeth v. Stone* and *Corning v. Burden* by the statement that "It is equally clear, however, that a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine." And, finally, it states that "this distinction between a process and a function has never been departed from by this court."

The argument, reduced to the form of a syllogism, appears to be this: A function, as always distinguished from a process, is not patentable. Some processes, however, are simply the functions of machines. Therefore, while certain processes are clearly patentable, certain others are not.

Admittedly, the function of a machine is not patentable. It is neither an art, nor a machine, nor either of the other subjects of a patent named in the statute. Like a principle, an idea, or an effect or result, it is a mere abstraction, possessing none of the attributes of an invention.¹ What is conceived to be a fallacy

¹ 1 Robinson on Patents, §§ 133-150.

in the reasoning of the court lies in the minor premise. That a process is, or may be, simply the function of a machine, is true only in the secondary sense of that term, — in other words, the process, so called, is no process at all. As already pointed out, a true process is distinct from the function of the machine, even where it can be carried out only by the operation of that machine; and no case has been cited in which such a process, when found to be new, was held to be unpatentable. In its intermediate proposition, therefore, the court seems to have used the term process, in its primary sense, as synonymous with the term in its secondary sense; which is shown by the fact that its conclusion, that certain processes — those, in general, which involve nothing more than the operation of a piece of machinery — are unpatentable, is made to apply to a process which, as stated, is admitted to be "a process in manufacture."

The patent in suit, after stating that the machinery which had been described for carrying out the invention was not claimed therein, since it was the inventor's intention to secure that by applications thereafter to be filed, concludes with four claims, of which the third, illustrative of all, is as follows: "The herein-described improvement in the art of manufacturing belt-pulleys, which consists in centering the pulley center or spider, boring the hub thereof, grinding the center or spider concentric with the axis of the pulley, securing the rim thereto, grinding the face of the rim concentric with the axis of the pulley, and then grinding or squaring the edges of the rim, substantially as described."

Here the invention is clearly stated in terms of an art, and not in terms of a function; and in this respect the patent differs essentially from that of Burden. The process, like Cochrane's process of manufacturing flour, "requires that certain things should be done with certain substances, and in a certain order; but the tools to be used may be of secondary consequence." Instead of being identified with the operation or function of the particular machine described, it can evidently be practiced by any one who has an ordinary foot-lathe and a tool for grinding. It is true that it is purely mechanical; but in this respect also the process does not differ from that of Cochrane — except, perhaps, that what might be called an elemental action, but was really nothing more than the mechanical action of air set in motion by purely mechanical means, was involved in the "blowing" step of the latter process.

It does not follow, however, that the patent should have been sustained. On the contrary, the decision that the patent was invalid is undoubtedly correct, because it appears that the process, apart from the machinery devised to carry it out, was not new ; and herein lies, it is thought, the real, and only real, distinction between this patent and that sustained as valid in *Cochrane v. Deener*. Every step specified in the claims was old and commonplace, and the court finds, as a matter of fact, that the patentee had invented nothing more than a new machine for carrying out an old process.

Had the court rested its decision upon this single fact, it would have stood upon firm ground. Instead, by applying to a process an old *dictum* respecting an abstraction and, as the result, by denying patentability to a vaguely defined class of true processes, it has taken what is conceived to be a long step backwards from the position reached and so clearly defined in *Cochrane v. Deener* and *Tilghman v. Proctor*.

What is said upon this subject, in the later *Westinghouse Case*, is admittedly *obiter dictum*. The decision there turned on the construction of a claim for a combination of mechanical elements in an air-brake, one of which was defined in terms of the function which it was designed to perform. Applying the rule that a function is not patentable, the court correctly held that this claim, to be valid, must be limited to the means shown and described for performing the function, or to its mechanical equivalent, and decided, by a bare majority, that it was not entitled to a range of equivalents broad enough to cover the defendant's brake and, therefore, was not infringed. It specifically declined to express an opinion upon the question whether the function of admitting air directly from the train-pipe to the brake-cylinder could have been patented as an independent process, since no such claim had been made. By citing, however, the case in which the hammock weaving process was sustained, rather than the later case¹ in which another circuit judge felt constrained by what he regarded as the rule laid down in the *Locomotive Works Case* to hold the same process unpatentable, it may, perhaps, fairly be inferred that the court was inclined to consider favorably the patentability of those processes which, although purely mechanical and ordinarily and most successfully performed by machinery, may also be performed

¹ *Travers v. Hammock & Fly Net Co.*, 78 Fed. Rep. 638.

by simple manipulation, — a question which it states was not concluded by the decision in the Locomotive Works Case.

It is important to note that, in a dissenting opinion filed in the Westinghouse Case, Mr. Justice Shiras, with the concurrence of Mr. Justice Brewer, states¹ that no reason is given in the authorities, and he can think of none in the nature of things, why a new process or method may not be patentable, even though a mechanical device or combination may be necessary to render it practicable, the term process seemingly being "used by the courts as descriptive of an invention which, from its novelty and priority in the art to which it belongs, is not to be construed as inhering only in the particular means described, in the letters patent, as sufficient to exemplify the invention and bring it into practical use." Here we have a statement of what is thought to be the true principle upon which the patentability of a process depends; and it shows, further, that at least two of the judges who participated in the decision in the Locomotive Works Case concurred in that decision, not for the reasons stated in the opinion therein, but because the invention was there found to inhere only in the machine described, the process itself being old.

Three other cases involving process claims have been decided by the Supreme Court since the Westinghouse Case. The process was held void, for want of novelty, in one,² and was sustained in another;³ but both of these processes involved the element of heat and probably some chemical action as well, and the subject of their patentability as processes was not discussed. The remaining case, however, requires consideration.

In *Busch v. Jones*,⁴ the patent contained four claims covering the mechanical elements of a press used for removing from printed sheets the indentations formed by the type in printing, and a fifth claim for the process of treating the printed sheets, by "subjecting a collection of such sheets to pressure without the use of fuller-boards, and while under such pressure tying them into a compact bundle with end boards, then removing them immediately from the press, and allowing them to remain tied sufficiently long to fix and complete dry pressing." This dry pressing, as it is called, had previously been done by placing a pile of printed sheets in a press

¹ 170 U. S. 537, 574.

² *United States Repair & Guarantee Co. v. Assyrian Asphalt Co.*, 183 U. S. 591.

³ *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403.

⁴ 184 U. S. 598.

and leaving them there, under pressure, until they had become sufficiently dry to remain smooth and flat. The patented method, by allowing the removal from the press of the bundle of sheets as soon as tied, effected a great economy in the number of presses required to do a given amount of work in a given time.

Comparing the patented press with a device for pressing and tying paper into bundles described in a prior patent, the court concludes that though in each the pressure first applied by the machine was retained by cords and continued in the bundle, yet its purpose in the Jones patent was to remove type indentations from the sheets, and in the prior patent to retain the sheets in the bundle, and therefore invention might be ascribed to the Jones patent if confined to the press proper. But the process claim, it is said, must be viewed from a different standpoint. And, premising the inquiry with a statement that it is entirely independent of questions as to what constitutes a patentable process discussed in the *Locomotive Works* and *Westinghouse Cases*, the conclusion is reached that the force at work in the process — both the pressure begun in the press and its continuance in the bundle by means of strings and cords — is entirely due to the press, and that, therefore, the process described is nothing but “the operation and effect of the machine.” Accordingly, the four claims for the press were sustained, and the process claim was held invalid.

Here, again, the process claimed was not new. The steps are precisely the same as those which were performed in the use of the old Dingham paper press — they are merely practiced upon printed sheets of paper, instead of plain sheets, though for a different purpose. The question of its patentability, therefore, would seem to depend solely upon whether the new use to which the process had been applied was so analogous to the old as to amount merely to a double use, or was so remote that the perception that the old process could be used for this new purpose involved an act of invention.¹ This, of course, is a question of fact, upon which opinions may well differ. On the other hand, it seems impossible to question the patentable character of the process. Pressure is always an effect, and may also be a cause; and here it is both. As a cause, or force, it is used to effect the removal of the type indentations, which is the ultimate end in view. It is the effect of whatever force is employed to produce it. When this pressure is

¹ *Potts v. Creager*, 155 U. S. 597, 608; *Hobbs v. Beach*, 180 U. S. 383, 392.

applied to the bundle of printed sheets by means of a particular press, it may then be said to be effected by "the operation," and be "the natural and direct effect," of that machine; but it may be applied by other means, — for instance, by a weight, or a simple lever. While the patent describes a press designed especially for this work, the process claimed is not limited in this respect, but consists in the doing of certain things to certain substances and in a certain order, without reference to the mechanical means to be employed therefor. The process, moreover, apparently involves elemental, as well as mechanical, action, since it is heat — presumably that of the atmosphere — which dries and so fixes the sheets.

What is the ground upon which the court rests its decision that this fifth claim is void? Were it not for the express disclaimer, it certainly would seem to be upon the ground stated in the Locomotive Works Case. Why, else, all the discussion about the operation and effect of the press? On the whole, however, it is probably the lack of patentable novelty in the process. The statement of the court that the different purpose in view neither added anything to the operation of the Jones press nor detracted anything from the operation of the Dingham press is, in effect, a finding that the processes performed in the operation of the two presses are identical; and the further finding that, notwithstanding this fact, invention may be ascribed to the Jones patent, "if it be confined to the press proper," may be taken as a denial of invention in the process. *Inclusio unius est exclusio alterius*. Except as it may possibly indicate a want of confidence in the reasoning in the Locomotive Works Case, the opinion in this case does not remove any of the confusion created by that decision.¹

¹ Since the case of *Risdon Locomotive Works v. Medart*, a number of process patents have been adjudicated in the Circuit Courts. *Travers v. Hammock & Fly Net Co.*, 78 Fed. Rep. 638; *Gindorff v. Deering*, 81 Fed. Rep. 952; *Pratt v. Thompson & Taylor Spice Co.*, 83 Fed. Rep. 516; *Amer. Strawboard Co. v. Elkhart Egg-Case Co.*, 84 Fed. Rep. 960; *Stokes Bros. Mfg. Co. v. Heller*, 96 Fed. Rep. 104; *Dodge Mfg. Co. v. Ohio Valley Pulley Works*, 101 Fed. Rep. 584; *Fabric Coloring Co. v. Alexander Smith & Son's Carpet Co.*, 109 Fed. Rep. 328; *Ballou v. Potter*, 110 Fed. Rep. 969; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 131 Fed. Rep. 740; *Manhattan General Const. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785; *Blakesley Novelty Co. v. Connecticut Web Co.*, 78 Fed. Rep. 480; *Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.*, 90 Fed. Rep. 201 (affirmed, 93 Fed. Rep. 958); *Melvin v. Thos. Potter, Sons & Co.*, 91 Fed. Rep. 151; *Westinghouse Elec. & Mfg. Co. v. Catskill Illum. & Power Co.*, 94 Fed. Rep. 868; *Chisholm v. Johnson*, 106 Fed. Rep. 191 (see, also, 115 Fed. Rep. 625); *Diamond Stone Sawing Mach. Co. v. Dean*, 111 Fed. Rep. 380; *Schlicht Heat, Light & Power Co. v. Aeolipyle Co.*, 117 Fed. Rep. 299; *Peters v.*

The situation, then, as it stands to-day, is as follows:

The Revised Statutes provide¹ that the inventor or discoverer of any new and useful art, or any new and useful improvements thereof, may obtain a patent therefor upon due proceedings had in compliance with the regulations prescribed.

A process—understanding the term, in its proper sense, as an act, or a series of acts, by means of which some physical change is produced in a material object—is an art, within the meaning of the statute, and as such is just as patentable as is a machine; provided (a qualification nowhere found in the statutes) it involves a chemical or other similar elemental action, such, for instance, as the action of electricity, heat, or, apparently, air mechanically set in motion. Of this there can be no question.

When a process which does not invoke any power of nature to aid in effecting the desired result may be performed by simple manipulation, although ordinarily and most successfully performed by machinery, it certainly ought to be patentable. There is no reason in the nature of things why it should not be; and to hold that it is not would surely seem to nullify, in part, the will of Congress as expressed in its duly authorized acts. Indeed, the patentability of such processes might be regarded as established by three cases,²

Union Biscuit Co., 120 Fed. Rep. 679 (see, also, 125 Fed. Rep. 601); *Kirchberger v. Amer. Acetylene Burner Co.*, 124 Fed. Rep. 764 (affirmed, 128 Fed. Rep. 599); *Chisholm v. Flemming*, 133 Fed. Rep. 924. There are also a number of decisions in the Circuit Courts of Appeals. *Wells Glass Co. v. Henderson*, 67 Fed. Rep. 930; *Amer. Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. Rep. 508; *Phil. Creamery Supply Co. v. Davis & Rankin Bdg. & Mfg. Co.*, 84 Fed. Rep. 881; *Chicago Sugar-Refining Co. v. Charles Pope Glucose Co.*, 84 Fed. Rep. 977; *Streator Cathedral Glass Co. v. Wire-Glass Co.*, 97 Fed. Rep. 950; *Chinnock v. Paterson, P. & S. Tel. Co.*, 112 Fed. Rep. 531; *Dayton Fan & Motor Co. v. Westinghouse Elec. & Mfg. Co.*, 118 Fed. Rep. 562; *Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co.*, 133 Fed. Rep. 167; *Kahn v. Starrells*, 135 Fed. Rep. 532. The subject has also been carefully considered by the Court of Appeals for the District of Columbia in two cases appealed from the Patent Office. *In re Weston*, 17 App. D. C. 431; *In re Cunningham*, 21 App. D. C. 28. And by the Commissioner of Patents. *Ex parte Creveling*, 111 O. G. 2489.

It may be stated that since the decision in the *Westinghouse Case* was handed down, the lower courts very generally have sustained patents for that class of processes the patentability of which was there left as an open question, while they quite uniformly have held unpatentable, as the mere function of a machine, those processes which apparently were identified with the operation of a machine, either because the steps of the process were, by express limitation, to be performed by means of a particular mechanical element or combination, or because the process could be performed in no other known way than by a machine.

¹ § 4886.

² In *Eames v. Andrews*, 122 U. S. 40, the claim sustained was for "the process of constructing wells by driving or forcing an instrument into the ground until it is pro-

in which claims for processes apparently belonging to this class were sustained, were it not for the doubt raised by *Risdon Locomotive Works v. Medart* and the later statement, in *Westinghouse v. Boyden Air Brake Co.*, that the question is still to be regarded as open. It may confidently be expected, however, that, when a case presents itself, the Supreme Court will hold, as it certainly seemed to intimate in the *Westinghouse Case* and as the lower courts have since held quite generally, that a process of this class is the proper subject for a patent.

The further proposition, that where a process is simply the function or operative effect of a machine the authorities are conclusive against its patentability, is correct only when properly understood. If the term process is taken in the secondary or subjective sense defined in *Corning v. Burden*, as representing merely, or as synonymous with, the function of, or the effect produced by, a machine, then indeed the proposition is conclusively established, both by the authorities and as a matter of principle. In this case, however, the process is not a process at all, but simply an abstraction, and for that reason unpatentable. If it means that a process, or art, is not patentable where it is new only in the sense that it is performed, better perhaps than before, by the operation and as the function of a newly invented machine, then it coincides with the facts of, and is established by, *Risdon Locomotive Works v. Medart*. In that case the process was not patentable because it was old and the whole invention inhered in, and was limited to, the particular means devised for carrying it out, as was apparently the *ratio decidendi* in *Busch v. Jones*. But this is as far as the court has yet gone. If the proposition means anything more — if, for instance, it means that a true process is not patentable, although altogether new, where it is seemingly identified with the function

jected into the water without removing the earth upward, as it is in boring, substantially as herein described."

In *Topliff v. Topliff*, 145 U. S. 156, the patent contained two claims, both of which were sustained, the first being for "the herein-described method of equalizing the action of springs of vehicles and distributing the weight of the load," namely, by "connecting together by a rigid rod the two pivoted links upon the clips employed on the hind axle."

And in *Hoyt v. Horne*, 145 U. S. 302, the claim on which a decree for the complainant was directed was as follows: "The improvement in beating rags to pulp in a rag engine having a beater-roll and bed-plate knives, consisting in circulating the fibrous material and liquid in vertical planes, drawing the same between the knives at the bottom of the vat, carrying it around and over the roll and delivering it into the upper section of the vat, substantially as described."

or operative effect of a machine because it can be performed in no other known way than by that particular machine — it not only does not find support in any actual decision of the Supreme Court, but is unsound in principle.

As stated in *Risdon Locomotive Works v. Medart*, the proposition is, at best, misleading. It was not properly applicable to that case, which could, and should, have been decided upon other grounds; and two of the justices who participated in that decision have since made it clear that they do not agree with the reasoning on which the decision is made to rest. Perhaps there were others. It is earnestly to be hoped, not only that the court will not extend the doctrine beyond the facts of that case, but will, as it alone can do, remove all the confusion which has resulted therefrom by reaffirming the broad principles of law governing the patentability of processes, so clearly set forth by Mr. Justice Bradley, and by placing the invalidity of patents for processes which are in fact old distinctly upon the correct statutory ground.

The patentability of a process should, under our laws, be determined solely by ascertaining whether such process, as distinguished from the means by which it is to be performed, is new and useful, and amounts to an invention or discovery. If it meets this test successfully, the process fulfills every requirement, and is the proper subject of a patent.

William B. Whitney.

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THE LAW SCHOOL. — No changes are to be recorded this year in the personnel of the faculty except in the extra courses. Mr. Charles J. Hughes, Jr., of Denver, Colorado, will give a course on the Law of Mining and Irrigation; Mr. Jeremiah Smith, Jr., son of Professor Smith, will conduct the course on Massachusetts Practice; and Professor Winter's absence in Europe will leave Mr. Willard in charge of the courses on Forensic Discussion and Voice Training. Professor Strobel and Assistant Professor Westengard are still on leave of absence in Siam. The changes in the curriculum are few. Assistant Professor Warren is conducting the entire course of Property II, instead of dividing it with Professor Beale, as last year. Constitutional Law will again be given by Professor Wambaugh, but as a whole course this year. Both Quasi Contracts and Admiralty are announced, the former to be conducted by Dean Ames, the latter by some one not yet determined upon. Dean Ames has prepared a new edition of his Cases on Pleading, and Professor Williston of his Cases on Sales, both books being in use this year in their respective courses.

The enrollment at the School on October 15th showed a decrease over that of last year. Statistics will be given in the December number.

CONSTRUCTIVE EVICTION. — The term eviction, originally confined to the dispossession of the tenant by process of law, was soon extended to any expulsion of the tenant by the landlord from actual possession of the demised premises. Later the courts recognized that certain acts of the landlord, while not depriving the tenant of actual possession of the prem-

ises, did prevent his possessing the beneficial use of them.¹ To cover these cases the doctrine of constructive eviction was established, allowing the same remedies as actual eviction. The determination of what acts amount to constructive eviction must depend on what rights rest in the tenant as against the landlord, and what acts of the landlord so violate these rights that the remedies furnished for actual eviction — suspension of rent and liability of the landlord in damages — seem desirable. By a lease, the tenant acquires, in general, a right as against the landlord to the possession of the premises in their present condition. Hence, when the landlord does any act on the premises leased,² or even as owner of those premises,³ which substantially injures them for the tenant's uses, the remedies for actual eviction appear necessary, and constructive eviction is held to have taken place. The same reasoning applies where easements leased as part of the premises are disturbed by the landlord;⁴ also where water, artificial light, or power hitherto transmitted to the leased premises from without is cut off by the landlord, since the use of the water, light or power is a privilege which constitutes a part of the demised premises.⁵

If, however, the landlord owns also adjacent premises and by virtue of his ownership of them does acts which substantially impair the tenant's use of the leased land, the courts seem to have established a distinction.⁶ Assuming that, in general, a lease gives to the tenant only rights connected with the land leased, and does not impose purely personal obligations on the landlord, they reach the conclusion that if a person who has leased to a tenant one plot of ground, does an act solely as owner of adjacent premises, which injures the tenant's use of his land but does not violate a general property right, no right of the tenant has been infringed. Thus the courts have held that no constructive eviction takes place where the erection of a building on the landlord's adjoining lot shuts off the tenant's light and air.⁷ The Washington supreme court recently reached the same result in a case where the landlord of premises leased for a saloon, through his ownership of adjoining premises, prevented the tenant from obtaining the necessary license. *Kellogg v. Lowe*, 80 Pac. Rep. 458. When, however, the act of the landlord, as owner of the adjacent lands, works substantial injury and violates a general property right of the tenant, — that is, if the tenant would have a right of action against the adjacent owner, were he a third person, — some courts have held it a constructive eviction.⁸ On the reasoning of the cases just discussed, this result could not be reached, since the landlord only can evict, and the landlord, as such, has done no injurious act. These decisions can perhaps be accounted for by the fact that the courts were more inclined to grant the remedies incident to eviction, where if allowed they would be merely alternative to those called forth by an unquestioned legal wrong.

¹ *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Edgerton v. Page*, 20 N. Y. 281.

² *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Skally v. Shute*, 132 Mass. 367.

³ *Grabenhorst v. Nicodemus*, 42 Md. 236.

⁴ *The People ex rel. Murphy v. Gedney*, 10 Hun (N. Y.) 151. See *Patterson v. Graham*, 40 Ill. App. 399. Cf. *Williams v. Hayward*, 1 E. & E. 1040.

⁵ *Germania Fire Insurance Co. v. Myers*, 4 Lanc. Law Rev. 151; *Brown v. Holyoke Water Power Co.*, 152 Mass. 463.

⁶ See *Doyle v. Lord*, 64 N. Y. 432, 439.

⁷ *Palmer v. Wetmore*, 2 Sandf. (N. Y.) 316; *Solomon v. Fantozzi*, 86 N. Y. Supp. 754.

⁸ *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Jay v. Bennett*, 4 Col. App. 252.

JURISDICTION OVER FOREIGN CORPORATIONS THAT HAVE CEASED TO DO BUSINESS IN THE STATE. — By comity, a corporation, though logically incapable of existing outside of the state which has chartered it, is recognized by the courts of a foreign state in which it does business when it comes to them seeking their aid.¹ When, however, the situation is reversed, when the courts are seeking the corporation, it is somewhat difficult to see how it can be found for the purposes of jurisdiction, unless, by express or implied compliance with legislative enactment, the corporation has submitted itself to the jurisdiction of the court.² The decisions, however, are in conflict. The courts of Massachusetts³ and Connecticut,⁴ following a *dictum* in an earlier New York case,⁵ have denied their jurisdiction in the absence of express statutory enactment. In England⁶ and New Hampshire⁷ the opposite rule has been established. It must, to be sure, be noted that neither the English nor the New Hampshire court dispenses entirely with statutory aid in sustaining its jurisdiction. In both cases statutes existed providing for service upon officers and agents of corporations. It might possibly be said that the courts have held only that the statutes applied as well to foreign as to domestic corporations. Whether, however, the rule in these cases is not in substantial conflict with the principle of the others is an inquiry of little moment to-day,⁸ in view of the almost universal modern legislation expressly providing for the service of process on foreign corporations as a condition to their doing business in the state.

The same principles, however, are involved in a question which has of late rather frequently arisen under these modern statutes. May a foreign corporation which has done business in the state but has withdrawn, still be amenable to process served upon its agent in the state? It seems clear that the termination of business dealings in the state need not *ipso facto* terminate the statutory agent's authority to receive service. In the absence of express provisions, however, such authority should not easily be implied. The company has submitted to the jurisdiction of the courts in return for the privilege of doing business in the state; when it voluntarily withdraws, the presumption would be that it has withdrawn for all purposes. A common class of statutes, however, provides for the designation of special agents — frequently state officers — other than the officers or business agents of the company, to receive service; and under these statutes some courts have held that jurisdiction over the company remains in respect to all liabilities incurred by the company while in the state.⁹ This was the result reached in a recent case decided in the New Jersey court of chancery. *Groel v. United Electric Co. of New Jersey*, 60 Atl. Rep. 822. Under substantially identical statutes the decisions are about equally divided. The view of the statute taken by the New Jersey court, however,

¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519.

² See *St. Clair v. Cox*, 106 U. S. 350; *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17, 34.

³ *Peckham v. North Parish*, 16 Pick. (Mass.) 274.

⁴ *Middlebrooks v. Springfield Fire Insurance Co.*, 14 Conn. 301.

⁵ *McQueen v. Middletown Manufacturing Co.*, 16 Johns. (N. Y.) 5.

⁶ *Newby v. Von Oppen*, L. R. 7 Q. B. 293.

⁷ *Libby v. Hodgdon*, 9 N. H. 394.

⁸ See, however, *Barrow S. S. Co. v. Kane*, 170 U. S. 100 (1898).

⁹ Sustaining the jurisdiction. *Collier v. Mutual Reserve Fund Life Ass.*, 119 Fed. Rep. 617; *Davis v. Kansas and Texas Coal Co.*, 129 Fed. Rep. 149. *Contra*, *Swann v. Mutual Reserve Fund Life Ass.*, 100 Fed. Rep. 922; *Freedman v. Empire Life Insurance Co.*, 101 Fed. Rep. 335. See also *Mutual Reserve Fund Life Ass. v. Phelps*, 190 U. S. 147.

appears reasonable, since, if jurisdiction were intended to continue only while the company remained in the state, provision for service on any persons other than the regular business agents of the company would scarcely be necessary.

“POLICE POWER” UNDER THE WILSON ACT OF 1890. — The right of a state to prohibit or regulate in any way the sale of domestic intoxicating liquors has long been undisputed.¹ But these prohibitions and regulations were rendered partially ineffective in 1890 by a decision of the Supreme Court that a state could not interfere with the sale of imported liquors still in their “original packages.”² As these “original packages” could, under the decisions at that date, be of any size, the liquors were imported in convenient parcels; and, under the protection of the court’s decision, were sold with impunity. To remedy this, the Wilson Act of 1890 was passed by Congress, providing that all liquors “transported into any state, or remaining therein, for use, consumption, sale, or storage therein, shall, upon arrival in such state, be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquors had been produced in such state.” In 1891 a prohibition law was pronounced constitutional under the Act,³ as being enacted in the exercise of the state’s police powers. The court based its decision on the ground that the Act gave no new powers to the states, but that it simply removed a restriction on their police powers which the silence of Congress (implying that Congress wished interstate traffic in that commodity to be untrammelled by State laws) had imposed upon them.

If a state has the right to prohibit the sale of liquor entirely, it is but logical that it can allow that business to be carried on subject to such regulations as the public welfare demands. On these grounds, a law of South Carolina which gave the state officials a monopoly of the liquor traffic, was held to be within the Wilson Act.⁴ Similarly the courts have upheld city ordinances (enacted under state laws) which exact license fees from all liquor dealers and impose on them other “regulations,” even though these ordinances result in large revenues.⁵ On the other hand a federal court in 1899 held invalid a licensing ordinance, in which no provision was made for regulation or inspection in the interests of the public welfare. Such an ordinance, the Court said, was not a police measure and so not within the Wilson Act.⁶ The reasoning of this case seems somewhat arbitrary in implying that a licensing act without “regulation” may not of itself be a police measure, since it may be a means of restricting or even prohibiting the sale of liquors. A broader view of the question has recently been taken by the United States Supreme Court. *Pabst Brewing Co. v. Crenshaw*, 25 Sup. Ct. Rep. 552. In this case, a Missouri “inspection law” providing for an examination as to the purity of all beer held for sale in the state was declared constitutional under the Wilson Act, although the fee exacted was

¹ *Mugler v. Kansas*, 123 U. S. 623.

² *Leisy v. Hardin*, 135 U. S. 100.

³ *In re Rahrer*, 140 U. S. 545.

⁴ *Vance v. Vandercook*, 170 U. S. 438 (1897).

⁵ *Duluth Brewing and Malting Co. v. City of Superior*, 123 Fed. Rep. 353 (1903).

⁶ *Pabst Brewing Co. v. City of Terre Haute*, 98 Fed. Rep. 330.

much greater than was demanded by the somewhat inadequate inspection. This stand of the court, though it rested in part on the fact that a state court had already held the law valid as far as it applied to domestic beer, seems to show a tendency toward a broader interpretation of the term "police powers," allowing the states to exercise more discretion in the control of the liquor trade.

CARRIER'S LIABILITY FOR DELAY CAUSED BY STRIKES. — The reasons of policy which underlie the common law rule that a carrier is liable for loss of goods unless caused by act of God or the public enemy do not hold where the action is for delay in delivery. The fear of collusion between the carrier and robbers which led Lord Mansfield to enunciate the doctrine that a carrier is an insurer,¹ had no application to delay, and a less strict rule of liability has therefore been applied. Where there is no express stipulation in the contract as to the time of delivery, a carrier is bound to deliver within a reasonable time under the circumstances, and where delay arises, the carrier is excused if it has exercised due diligence in the matter.² It would seem that this rule should apply to delays caused by strikes among its workmen, as it does to delays arising from other causes. In strikes unaccompanied with violence, a distinction must be made. If the strike is caused by a dispute as to wages, the carrier must pay whatever is necessary to retain its old employees or to obtain new ones to fill their places. It is under a public duty to run its trains regularly, and due diligence therefore requires it to forward its freight at the earliest possible moment without regard to cost.³ But where it is unable, as in the case of a "sympathetic strike," to fill the places of its recusant employees at any advance in price, it should be excused for delay in the absence of negligence on its part.

A doctrine, however, has gained currency by repetition, though supported by only two decisions⁴ (one since weakened by a limiting decision), to the effect that a carrier is liable absolutely for a delay which is caused by a strike unaccompanied with violence. These decisions proceed on the ground that the delay is caused by the misconduct of the carrier's agents, for which the former is liable under the doctrine of *respondeat superior*. They assume that a strike is always wrongful, which would negative the proposition that a man may, in the absence of agreement, terminate his employment when he wishes. But whether the strike is wrongful or not, how long can the acts of former employees impose liability upon their former principal? A principal is liable for the acts of its agents done in the usual course of their employment. But an employee by the very act of striking terminates his agency, so that he is no longer able, except under circumstances working an estoppel, to subject his principal to liability.⁵ Consequently, there seems to be no reason for imposing upon the carrier a stricter liability than that which holds him to due diligence in avoiding delay.

When violence is present in a strike, however, the courts have worked

¹ *Forward v. Pittard*, 1 ¶. R. 27.

² *Geismer v. Lake Shore, etc.*, R. R. Co., 102 N. Y. 563; *Pittsburg, etc.*, R. R. Co. v. *Hollowell*, 65 Ind. 188.

³ *People v. New York, etc.*, R. R. Co., 28 Hun (N. Y.) 543.

⁴ *Read v. St. Louis, etc.*, R. R. Co., 60 Mo. 199; *Blackstock v. New York, etc.*, R. R. Co., 20 N. Y. 48; limited by *Geismer v. Lake Shore, etc.*, R. R. Co., *supra*.

⁵ *Geismer v. Lake Shore, etc.*, R. R. Co., *supra*.

out a more logical result. As illustrated in a late case in the Texas Court of Civil Appeals, they hold that where a carrier uses all reasonable means to fill the places of striking workmen, and is prevented from forwarding freight only by the violent acts of the strikers, it is not liable for the delay. *Sterling v. St. Louis, etc., R. R. Co.*, 86 S. W. Rep. 655. Since the courts reach this result without adequately distinguishing the cases involving strikes without violence, it seems to constitute a tacit disapproval of the doctrine of those cases.

TROVER FOR CONVERTED MONEY. — The rule of law which allows the owner of stolen property to succeed in an action of trover against a *bona fide* purchaser for value¹ must be qualified by exceptions in the cases of money and negotiable securities payable to bearer. It seems in these cases to be accepted law that a *bona fide* transferee is not liable, either in trover or in any other form of action, provided that he has in the technical sense given value for the securities or money.² That the reason for the exception is obscure is evidenced by a recent decision of the Supreme Court of Indiana, which held, opposing the authorities, that where the maker of a note took it up with stolen money at a bank to which the payee's bank had forwarded it, the payee was liable in trover for the amount, though the money was received in ignorance of the theft, and the facts afforded evidence of value under the Indiana law. *Porter v. Roseman*, 74 N. E. Rep. 1105.

The well-established exception made in the case of money and securities has been usually based on the ground of public policy, — that it would be a very serious hindrance to the conduct of business if negotiable securities, and above all, money, did not carry a clear title to a *bona fide* transferee.³ A more satisfactory line of reasoning, perhaps, is suggested by the theory of a German scholar, Prof. Heinrich Brunner, who argues that paper on its face payable to bearer, such as bank-notes and government certificates, passes title to its holder, who, by virtue of his very possession, being the bearer, becomes the legal owner, no matter how he may have come by the paper.⁴ Though the theory is not in terms extended to coined money, the same must be true in that case, since the stamp of the government on a coin is a guarantee to the bearer, as such, of its value. If this is true, the action of trover would not be a proper one even against the thief. When, however, the bearer is a wrong-doer, he has in equity no right to keep either paper or coined money, and should be held a constructive trustee for the real owner. In allowing trover against the guilty holder of such a title, but denying redress against one who has acquired title in good faith, and is hence bound by no constructive trust, the courts seem unwittingly to have allowed an equitable remedy, with its characteristic equitable limitations, under the forms of a common law action.⁵

PRESUMED DEDICATION OF A JUS SPATIANDI. — The unorganized public as such is incapable of acquiring interests in realty by deed; consequently,

¹ *White v. Spettigue*, 13 M. & W. 603.

² *Nassau Bank v. National Bank of Newburgh*, 159 N. Y. 456; *Wheeler v. King*, 35 Hun (N. Y.) 101.

³ *Miller v. Race*, 1 Burr. 452.

⁴ 2 Endemann, Handbuch 163.

⁵ Cf. cases cited in Ames, Cases on Trusts, 2d ed., 10, n. 2.

where the legal fiction of a lost grant persists, the public cannot, strictly speaking, take by a prescriptive right.¹ This reasoning is recognized in England, since the Prescription Act of William IV. is held not to extend to easements in gross.² In that country, too, dedication to public purposes is yet in its infancy. Highways, bridges and squares are of course subjects of express dedication, and from adverse public user, generally for the period of the Statute of Limitations, English courts sometimes draw an inference of dedication or of condemnation by the proper authorities.³ To find an actual dedication for purposes other than those mentioned, they demand strong evidence,⁴ and the assertion is made, moreover, that from user merely for purposes of recreation and instruction, no right can be gained by the public.⁵ This statement of the law was affirmed by a recent English case which denied to the public any right in the grounds covered by the ancient monuments at Stonehenge. *Attorney-General v. Antrobus*, [1905] 2 Ch. 188. The road through private property to the stones was also said not to be a highway, but to be accessory to the monuments and dependent upon the same principles as the *jus spatiandi* in their neighborhood.⁶

In this country courts are much more ready than in England to find actual dedication.⁷ It is also quite generally held that adverse user for the statutory period raises a conclusive presumption of dedication.⁸ To this process the term prescription is often loosely applied. Indeed, where the analogy to the Statute of Limitations is adopted as the basis of prescription, the presumption of a grant or of dedication becomes unnecessary, and the term is perhaps properly applicable. In American as well as in English courts it has been stated that nothing but highways and the like can be acquired by adverse public user.⁹ It is argued in support of this contention, first, that landowners should be encouraged in allowing access to private grounds attractive in themselves or by reason of some monument thereon,¹⁰ and second, that the user by the public is permissive and with no claim of right.¹¹ These two considerations seem to apply indifferently to all prescription, and to furnish no ground for a distinction. The second of them constitutes always a question of fact, but in the case of private prescription where there is found a twenty years' user without license, the court seldom appears to require explicit evidence as to the state of mind of the landowner or the trespasser.

Whether an easement is for pleasure or for profit or whether a road is a highway or ends in public or in private property¹² appears on theory to be unimportant when adverse user for the prescriptive period is found. The

¹ Washburn, Easements § 404; see *Pittsburgh, etc., Ry. Co. v. Town of Crown Point*, 150 Ind. 536.

² *Shuttleworth v. Le Fleming*, 19 C. B. (N. S.) 687.

³ *Board of Works v. Maudslay*, L. R. 5 Q. B. 397; *Queen v. Inhabitants*, 11 Q. B. 877.

⁴ *Tyne Improvement Commrs. v. Imrie*, 81 L. T. R. 174.

⁵ See *Bourke v. Davis*, 44 Ch. D. 110; *Giant's Causeway Case*, summarized in 32 Ir. L. T. 211.

⁶ See *Campbell v. Lang*, 1 Macq. H. L. Cas. 451; *Young v. Cuthbertson*, *ibid.* 455; *Elliott, Roads and Streets* 1.

⁷ See 16 HARV. L. REV. 332.

⁸ See *State v. Kansas City, etc., R. Co.*, 45 Ia. 139; *Schwerdtle v. County of Placer*, 108 Cal. 589; *Commonwealth v. Coupe*, 128 Mass. 63.

⁹ *Post v. Pearsall*, 22 Wend. (N. Y.) 425; 16 HARV. L. REV. 128.

¹⁰ 69 J. P. 217.

¹² *Nichols v. State*, 89 Ind. 298.

¹¹ *Attorney-General v. Antrobus*, *supra*.

broad doctrine of prescription and the reasons of public policy supporting it are as easily applicable to the acquisition of any incorporeal right of use, convenience, or value to the public, as to the acquisition of any purely private rights. Yet it must be granted that although the presumed dedication (based often on estoppel) of cemeteries and springs is not infrequent,¹⁸ cases are exceedingly rare in either country where the public has gained a prescriptive right in the nature of a *jus spatiandi*. It seems likely that the common law courts will continue to show a disinclination to extend such acquisition beyond the established cases of highways, parks and squares.

TOLLING OF STATUTE OF LIMITATION BY ONE OF SEVERAL OBLIGORS. — The doctrine that acknowledgment or part payment extends a debt or revives one barred, is a judicial engrafting upon the original Statute of Limitations of James I. It is now generally recognized that such payment or acknowledgment operates not as a waiver of the defense of the statute, continuing the cause of action, but as a fresh promise. Either view presents difficulty as to consideration, but the case must be regarded as a lingering example of moral consideration supporting a promise.¹ If, then, the theory is that of a new contract, there must exist circumstances from which an unequivocal promise can be inferred. Such a promise, therefore, can be made only by the party to be charged or his authorized agent.² Yet there has existed a great conflict, now partly allayed by statutes, as to the effect of payment by one of several persons having a community of interest. Thus, Lord Mansfield, in a leading case³ now overruled by statute, held that payment by one joint obligor, for purposes of the statute, is payment by all; while the United States Supreme Court has reached an opposite result, concurred in by a majority of the states.⁴ There is a similar diversity of views as to the effect of part payment by a partner after dissolution of the partnership. Here, too, regarding the dissolved partners merely as joint obligors, the majority of the states deny one authority to revive or extend a debt against others. Some, however, follow the early English authority; still others sanction only an extension, not a revival, while a few make notice to the creditors a determining factor. The prevailing rule, which has recently been adopted in several states by statute, seems sound. Whether one person has power to bind another by his promise, express or implied, is a question of fact in each instance, but from the mere relationship of joint obligors no such agency can be inferred.

It would seem that when the question arises through payments by one of several testamentary beneficiaries the same rule must guide, and part payment by one should affect only his own interest or that of those for whom he is authorized to act. Yet the English Chancery Division has recently held, in a case arising under a statute making a decedent's real estate assets in equity for simple contract debts, that part payment by a tenant for life of part of the estate bound persons who were both remaindermen and

¹⁸ *Boyce v. Kalbaugh*, 47 Md. 334; *Larkin v. Ryan*, 25 Ky. Law Rep. 613.

¹ See 16 HARV. L. REV. 517.

² *Payne v. Slate*, 39 Barb. (N. Y.) 634, 638.

³ *Whitcomb v. Whiting*, 2 Doug. 652.

⁴ *Bell v. Morrison*, 1 Pet. (U. S.) 351.

devisees of other lands. *In re Chant*, [1905] 2 Ch. 225. By previous adjudication it has been decided in England that the life tenant, since it is his duty to keep down the interest on the estate, by virtue of his tenancy, has implied authority to bind those in remainder.⁵ No such identity of interest, with the resulting implication of authority, seems to be recognized in this country.⁶ But in going beyond this step and holding that payment by the life tenant keeps alive the testator's debt against the estate of specific devisees of other land the court followed what are in fact *dicta* in an earlier case which have been much criticised in later English decisions.⁷ Not even in England can one devisee, as such, deprive another of his statutory privilege.⁸ In this country payment by a widow of mortgaged premises has been held not to remove the bar as against the heir.⁹ Again, payment by the heir or grantee of the mortgagor as to part of mortgaged premises does not arrest the operation of the statute in favor of the grantee of another part.¹⁰ Though American cases of this nature have been rare, they show a desirable uniformity with the cases of joint obligation, and a tendency to restrict the anomalous doctrine of part payment to its proper, narrow limits.

RECENT CASES.

ACCORD AND SATISFACTION — VALIDITY — EFFECT OF STATUTE OF FRAUDS. — In consideration that the defendant marry him, the plaintiff orally promised to consider a debt which the former owed him as paid and satisfied. After marriage the plaintiff brought action on the obligation and, to the defendant's plea of accord and satisfaction, objected that as the agreement was oral, it was invalid under the Statute of Frauds making contracts in consideration of marriage unenforceable. *Held*, that the plea is good. *Weld v. Weld*, 81 Pac. Rep. 183 (Kan.).

There are two possible views of the nature of an accord and satisfaction. The first is illustrated by the present case, which regards it as an executed agreement whereby the original obligation is utterly extinguished. *Lavery v. Turley*, 6 H. & N. 239. The other theory holds that it is a contract executory as to the obligee's promise. He has agreed never to sue on his original obligation which is considered as still existing; and this promise is enforced by courts of law as a defense to the original liability. This view is suggested by the rule that upon the rescission of the accord and satisfaction the original obligation may be sued upon. *Heavenrich v. Steele*, 57 Minn. 221. However, as this rule is supported upon the ground that the extinguished obligation is revived by the rescission, it furnishes but slight basis for the second theory. Furthermore, as the plea of accord and satisfaction was recognized before a contract never to sue or indeed before any simple contract was known to the law, the theory that in allowing this defense the court is merely enforcing the plaintiff's promise not to sue, is clearly untenable. Y. B. 21 & 22 Edw. I. 586 (Rolls series).

⁵ *Roddam v. Morley*, 1 De G. & J. 1; *In re Hollingshead*, 37 Ch. D. 651.

⁶ *Ætna Life Insurance Co. v. McNeely*, 166 Ill. 540.

⁷ *Roddam v. Morley*, *supra*. For a consideration of the English authorities, see 49 Sol. J. 563, 682.

⁸ See *Dickenson v. Teasdale*, 1 De G. J. & S. 52; *Cooper v. Cresswell*, L. R. 2 Ch. 112.

⁹ *Nickell v. Leary*, 91 N. Y. Supp. 287; *Ætna Life Insurance Co. v. McNeely*, *supra*.

¹⁰ *Murdock v. Waterman*, 145 N. Y. 55; *Mack v. Anderson*, 165 N. Y. 529.

ADVERSE POSSESSION — LIFE TENANT UNDER VOID DEVISE HOLDING AGAINST REMAINDERMAN. — A married woman, who was legally without testamentary capacity, devised certain land to her husband for life with remainder to the plaintiff. The husband entered at his wife's death and held possession for twenty-one years, devising the property upon his death to the defendant. *Held*, that the defendant has title. *In re Anderson*, [1905] 2 Ch. 70.

Where a testator without title devises land to A for life with remainder to B, and A occupies for twenty years, it has been held that the true owner is barred, but that A is estopped to deny B's right to the remainder. *Board v. Board*, L. R. 9 Q. B. 48; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86. The present decision, which distinguishes between a valid will by a testator without title, and a void will by one having title, disregards the intention to claim only a life estate. See *Paine v. Jones*, L. R. 18 Eq. 320, 326; but *cf. Kernaghan v. McNally*, 12 Ir. Ch. 89. As it is the intention which determines whether the possession is adverse, so it would seem that the intention should determine the *quantum* of the estate. *Cf. Bond v. O'Gara*, 177 Mass. 139. It would appear better not to invoke the doctrine of estoppel, but to regard the entry of the claimant as in the nature of a tortious feoffment, effecting a disseisin of the true owner and vesting in the disseisor a tortious life estate, with a tortious remainder in the person whom he recognizes as remainderman. The owner, having been thus disseised, is barred after the statutory period, and the tortious estate becomes lawful. Under this doctrine the rights of the remainderman would be independent of any instrument purporting to convey title.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — CONTRACTUAL RESPONSIBILITY WHEN PRINCIPAL IS FICTITIOUS. — The defendant, as agent for a non-existing corporation, took a lease under seal from the plaintiff. *Held*, that the agent is liable on the lease for the rent. *Schenkberg v. Treadwell*, 94 N. Y. Supp. 418.

On strict theory this *per curiam* opinion seems difficult to support. By the weight of authority, when an unauthorized agent makes a contract for a principal actually existing, the agent is not liable on the contract. *Lewis v. Nicholson*, 18 Q. B. 503; *Noe v. Gregory*, 7 Daly (N. Y.) 283. When the principal is fictitious, however, the agent is often held liable on the contract, on the ground that otherwise it would be wholly inoperative. *Kelner v. Baxter*, L. R. 2 C. P. 174. Yet in the real essence of the situation, there is little difference between a principal who gives no authority and one who does not exist. See *Bartlett v. Tucker*, 104 Mass. 336. But here the instrument is under seal; and however loosely a simple contract may be treated, the law is strict that only those named as parties to a sealed instrument can sue or be sued upon it. *Henricus v. Englert*, 137 N. Y. 488. There seems to be no urgent necessity for relaxing the rule in the case at hand, as an adequate remedy lies for deceit, or for breach of an implied warranty of authority. *Polhill v. Walter*, 3 B. & Ad. 114; *Collen v. Wright*, 8 E. & B. 647.

BANKRUPTCY — PREFERENCES — SURRENDER. — At the suit of a trustee in bankruptcy, a mortgage given by the bankrupt to a creditor who retained it in good faith was adjudged void as a preference. Thereafter the trustee refused to permit proof of the creditor's claim because the latter had not surrendered his preference within the meaning of § 57 g of the Bankruptcy Act, which provides in substance that claims of preferred creditors shall not be allowed unless they surrender their preferences. *Held*, that proof of the claim be allowed. *Keppel v. Tiffin Savings Bank*, 25 Sup. Ct. Rep. 443.

The lower federal courts have generally held that a creditor who retains his preference until judgment depriving him of it cannot prove his claim since he has not "surrendered" his preference. *Re Greth*, 112 Fed. Rep. 978. A realization of the hardship of this result, however, induced some courts to suspend judgment for a reasonable time in order to enable a creditor who had acted in good faith to surrender his preference and thus to prove his claim. *Zahn v. Fry*, Fed. Cas. 18198. In the present case, the court avoided penalizing the creditor by construing the word "surrender" to mean the transfer of

a preference after judgment. Undoubtedly the purpose of § 57g is not penal, but is to secure a fair distribution of the debtor's assets. See *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 449. The interpretation which would effectuate this purpose without doing violence to the expressed intent of the legislature is best. And this consideration certainly goes far to justify the somewhat strained construction resorted to by the court. It is, however, questionable whether this was not a case for legislative action rather than judicial construction.

BILLS AND NOTES — NEGOTIABILITY — CERTAINTY IN AMOUNT. — In an interest-bearing note it was provided that interest not paid semi-annually should become a part of the principal and itself bear interest. *Held*, that the amount of the note is not thereby rendered uncertain, nor the negotiability of the note destroyed. *Brown v. Vossen*, 87 S. W. Rep. 577 (Mo., Kansas City Ct. App.)

In order that a note shall be negotiable it must be for a sum certain. *Palmerv. Ward*, 72 Mass. 340. But this rule has been considerably weakened, and much uncertainty and confusion has arisen from a loose interpretation of the words "sum certain." At present the weight of opinion seems to be that a provision for increasing the rate of interest after maturity does not destroy negotiability. *Towne v. Rice*, 122 Mass. 67. Nor is negotiability impaired by a stipulation for payment of attorneys' fees and costs in case suit is brought to enforce collection. *Adams v. Addington*, 16 Fed. Rep. 89. But an agreement to pay a sum named "with exchange" is not negotiable. *Hughitt v. Johnson*, 28 Fed. Rep. 865. The distinction drawn is that the amount of the agreement at maturity depends on the fluctuations of exchange; while in the two former cases the amount is certain if paid at maturity. In the case at hand the amount of the note at maturity clearly depends on a contingency; to call it a sum certain seems a contradiction in terms.

CARRIERS — DELAY — LIABILITY FOR DELAY CAUSED BY STRIKE. — *Held*, that where cattle were injured in transportation by delay caused by the interference of strikers, the carrier is not liable if it has exercised reasonable diligence to expedite the shipment. *Sterling v. St. Louis, etc., R. R. Co.*, 86 S. W. Rep. 655 (Tex., Civ. App.). See NOTES, p. 54.

CARRIERS — TICKETS — EJECTION. — A contract between the parties provided that the appellant should furnish transportation to the appellee, on condition that the contract should be presented to and endorsed by the former's agent. The agent refused to endorse it. In consequence, the appellee was ejected from the train for not paying his fare. *Held*, that the appellant is liable for the ejection. *Texas, etc., Ry. Co. v. Payne*, 87 S. W. Rep. 330 (Tex., Sup. Ct.).

Although there is a well defined conflict of authorities, the better opinion seems to be that the carrier is not liable for ejecting a passenger who is without an apparently good ticket, if he refuses to pay his fare. See 9 HARV. L. REV. 353. This conclusion is reached either upon the basis of reasonable regulations, or by the application of the law of contracts. See 12 HARV. L. REV. 61. The present decision is of interest because a formal written contract is involved instead of a mere ticket, and because the court bases its reasoning on principles of contract law. Yet it seems that in this case, at any rate, the opposite result would be reached by this method. The railroad company has promised to transport the appellee only on condition that the agent endorse the contract. This condition precedent has not happened; hence the company has not broken its promise of transportation. The conclusion is unavoidable that the appellant is liable for its agent's refusal to endorse the contract, but not for the ejection of appellee. See *Frederick v. Marquette, etc., R. R. Co.*, 37 Mich. 342, 346.

CHINESE EXCLUSION ACTS — EXCLUSION OF CHINAMAN CLAIMING CITIZENSHIP. — The Chinese Exclusion Act of 1894, as amended by the Act of 1903, provided that the decision of the appropriate immigration officers excluding an alien should be final unless reversed on appeal to the Secretary of Commerce and Labor. The latter official denied admission to a Chinaman who alleged

that he was a native-born citizen of the United States returning after a temporary absence. *Held*, that the decision is not reviewable by the federal courts. Brewer, Day and Peckham, JJ., dissented. *United States v. Ju Toy*, 25 Sup. Ct. Rep. 644.

The constitutionality of this power of the Secretary of Commerce in cases where the applicant is admittedly an alien, seems to be settled. *Nishimura Ekiu v. United States*, 142 U. S. 651, 659. It has also been held that an applicant claiming citizenship cannot resort to the federal courts before he has prosecuted an appeal to the Secretary. *United States v. Sing Tuck*, 194 U. S. 161. It is clear that the constitutional guaranties relating to the trial of criminals have no application, as the inquiry is not a criminal proceeding. *Cf. Fong Yue Ting v. United States*, 149 U. S. 698. A more serious question is whether Congress has not invested executive officials with power properly belonging to the judiciary and contravening the requirement of due process of law. It may be that the power to exclude or expel persons admittedly aliens is political in its nature, and the official's decision in regard to such persons is due process of law. *Japanese Immigrant Case*, 189 U. S. '86. But if the applicant be in fact a citizen of the United States, he cannot be excluded except as a punishment for crime. See *In re Sing Tuck*, 126 Fed. Rep. 386, 388; *Lee Sing Far v. United States*, 94 Fed. Rep. 834, 836. It would seem, therefore, that the determination of his constitutional right of citizenship is a judicial and not an executive function.

CONFLICT OF LAWS — PRIORITY AMONG SUCCESSIVE ASSIGNEES IN DIFFERENT JURISDICTIONS. — A, while domiciled in New York, assigned to B his reversionary interest in an estate invested in English trust securities. Later, while in England, A assigned this reversionary interest to the plaintiff, who at once notified the trustees. Afterwards B gave notice of the earlier assignment. *Held*, that the plaintiff has the priority. *Kelly v. Selwyn*, [1905] 2 Ch. Rep. 117.

The question here involved seems to have arisen for the first time. By New York law, notice to a debtor or to a trustee is not necessary to complete an assignment of a chose in action or of a reversionary interest in personalty. *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Fortunato v. Patten*, 147 N. Y. 277. But in England, a subsequent assignee secures preference if he gives notice first to the debtor or trustee, provided he had no notice of the prior assignment. *Dearle v. Hall*, 3 Russ. 1; *Foster v. Blackstone*, 1 Myl. & K. 297. The court admits that the New York assignment was valid in accordance with the general rule that the validity of an assignment of a chose in action is determined by the law of the place of transfer. *Alcock v. Smith*, [1892] 1 Ch. Rep. 238; *May v. Wannemacher*, 111 Mass. 202. But it takes the sound view that in administering an English trust fund, the order in which claimants will be entitled must be regulated by the law of the court administering the fund. Those claiming as assignees, therefore, will have priority according to the order in which they have given notice and thereby have completely constituted themselves *cestuis que trust* under the English law.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — NON-RESIDENT DEFENDANT. — An abandoned spouse removed to another state, where he acquired a *bona fide* domicile, and later instituted divorce proceedings. Substituted service of process was made upon the non-resident defendant in accordance with the laws of the state granting the divorce. *Held*, that the decree of divorce is entitled to full extra-territorial validity under the "full faith and credit" clause of the Federal Constitution. *North v. North*, 93 N. Y. Supp. 512.

The New York courts regard divorce as a proceeding *in personam*. *People v. Baker*, 76 N. Y. 78. They have consistently held that no foreign divorce obtained against a non-resident, non-appearing defendant would have extra-territorial validity, unless the defendant was personally served with process within the jurisdiction of the divorce court. *O'Dea v. O'Dea*, 101 N. Y. 23. So serious are the objections to this doctrine, that most courts have rejected it as unsound. See 15 HARV. L. REV. 66; 18 *ibid.* 215. The rule has been

modified by a recent decision holding that where an abandoned spouse sues in the state of the last matrimonial domicile, and substituted service was made upon the non-resident defendant, divorce so procured is entitled to extra-territorial validity under Art. 4, § 1 of the Federal Constitution. *Atherton v. Atherton*, 181 U. S. 155, reversing S. C., 155 N. Y. 129. The present decision is a further extension of this rule to the case where the abandoned spouse sues in another state in which he has acquired a *bona fide* domicile. The reasons which underlay the former decision would seem to hold equally here, and the case marks an important development in this branch of the New York law.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF STOCKHOLDERS TO ELECT DIRECTORS. — A minority stockholder prayed for a decree enjoining the Equitable Life Assurance Society from amending its charter so as to allow its policy holders to elect twenty-eight out of fifty-two directors. *Held*, that the right to influence the management of a company by the selection of its directors is a property right, of which the amendment would deprive the plaintiff without due process of law, and that the motion should therefore be granted. *Lord v. Equitable, etc., Society*, 94 N. Y. Supp. 65.

This decision seems to flow naturally from two established doctrines. The right of a stockholder to vote is an essential part of his property right in the stock. *Kinnan v. Sullivan County Club*, 26 N. Y. App. Div. 213. And it is unconstitutional to deprive an owner of any essential attribute of his property without due process of law. *Matter of Jacobs*, 98 N. Y. 98; *People v. Otis*, 90 N. Y. 48. The defendants cited two cases: one holding valid a statute allowing cumulative voting for directors, the other sustaining a statute which increased the proportion of railroad directors to be elected by a municipal stockholding corporation, the original allotment having become unjust because of the failure of several subscribers to pay in their subscriptions. *Looker v. Maynard*, 179 U. S. 46; *Miller v. State*, 15 Wall. (U. S.) 478. These cases are not exactly in point. One regulates the property right of voting one's stock; the other restores the conditions of proportionate division of directors under which the plaintiffs had subscribed. The mutualization would take out of the control of the stockholders the surplus in which they have a right to share, and would, therefore, be a "taking of property without due process." For a more extended discussion of the case, see 17 GREEN BAG 353.

CONSTITUTIONAL LAW — EMINENT DOMAIN — LAND TAKEN FOR PRIVATE IRRIGATION DITCH. — *Held*, that a state statute authorizing a landowner to condemn a right of way over adjoining land for the construction of an irrigation ditch to supply water for his own land, is constitutional. *Clark v. Nash*, 198 U. S. 361.

The court, in affirming the decision of the Supreme Court of Utah, bases its opinion wholly upon the peculiar agricultural conditions in that state. For a discussion of the principles involved, see 17 HARV. L. REV. 493.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM TO CONTRACT. — A statute made it obligatory upon any person or corporation issuing in payment of wages an order upon its store for goods to redeem such order in lawful money or goods at the option of the holder. *Held*, that this statute is unconstitutional. *Leach v. Missouri, etc., Co.*, 86 S. W. Rep. 579 (Mo., Ct. App.).

A like statute has been declared constitutional by the Supreme Court of the United States upon the ground that it is a valid exercise of the police power. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13. The purpose of such legislation is to protect workmen from unscrupulous exactions. Undoubtedly where the laborer is at a great disadvantage in bargaining with his employer such protection is desirable and may be justified under the police power. But whenever the situation of the employee, due to industrial conditions such as the scarcity of labor or the strength of trade unions, is such that he can adequately protect his interests, state interference would be unnecessary. Under these conditions statutes aimed to accomplish this purpose, not being justified as an exercise of the police power, would be unconstitutional as an

interference with the liberty to contract. See *In re Preston*, 63 Oh. St. 428, 438. The constitutionality of such a law, therefore, would depend in each case upon the question of fact as to the local industrial conditions.

CONTRACTS — DEFENSES: NON-PERFORMANCE BY PLAINTIFF — REPUDIATION AS WAIVER OF VALID DEFENSE. — The defendant, on insufficient grounds, repudiated a contract to buy goods in two installments. The plaintiff thereafter made tender of the goods. *Held*, that by repudiating, the defendant bars himself from setting up the defectiveness of the first installment, subsequently discovered, as a defense. *Braithwaite v. Foreign Hardwood Co.*, 21 T. L. R. 413 (Eng., C. A.).

According to the recognized English doctrine regarding anticipatory breach, the innocent party, by not acting on the repudiation, treats the contract as still existing, and holds the other party to its performance. See 14 HARV. L. REV. 317, 422. In such a case the only effect of the repudiation is to free the plaintiff from liability for any failure on his part directly caused by the defendant's repudiation. See *Cort v. Ambergate, etc., Co.*, 17 Q. B. 127. In all other respects the repudiator may avail himself of all rights under the contract, *Smith v. Georgia Loan Co.*, 113 Ga. 975. In the principal case the plaintiff clearly treated the contract as subsisting. If, then, the defendant had a defense, as the trial judge seemed to admit, because of the defectiveness of the first consignment, he should not be barred from setting up such valid defense by previously asserting an untenable ground for repudiation. See *In re London, etc., Bank*, L. R. 7 Ch. 55. This is true for the reason that the plaintiff must broadly aver performance of all conditions, express and implied, and under the supposed facts he cannot sustain his allegation. *Green v. Edgar*, 21 Hun (N. Y.) 414. Whether the plaintiff's breach of improper shipments would have warranted the defendant in treating the contract broken, on his part, was a question of fact which should be dependent on the materiality of the breach, of which the element of *in limine* was an important consideration. See 18 HARV. L. REV. 61.

CORPORATIONS — FOREIGN CORPORATIONS — RIGHT OF ACTION AGAINST. A New Jersey statute requires foreign corporations wishing to do business in the state to designate an agent to receive service of process in actions against the company. *Held*, that service on the agent after the company has ceased doing business in the state gives the court jurisdiction over the corporation. *Groel v. United Electric Co.*, 60 Atl. Rep. 822 (N. J., Ch.). See NOTES, p. 52.

CORPORATIONS — INSOLVENCY OF CORPORATION — RIGHT OF SIMPLE CONTRACT CREDITOR TO APPOINTMENT OF RECEIVER. — *Held*, that a creditor of a corporation, who has not reduced his claim to judgment, cannot maintain a suit for the appointment of a receiver, although all the assets of the corporation have been distributed among its individual members. *McKee v. City Garbage Co.*, 103 N. W. Rep. 906 (Mich.).

The general rule is that a creditor is not entitled to the appointment of a receiver until he has secured a judgment and exhausted his remedy at law by having an execution issued and returned unsatisfied. *Adee v. Bigler*, 81 N. Y. 349. Some courts, however, have departed from this rule in cases where the assets of an insolvent corporation were in danger of being lost or fraudulently disposed of by its officials, and the remedy at law was inadequate. *Cf. Kentucky, etc., Ass'n v. Galbreath*, 77 S. W. Rep. 371; *Doe v. Northwest, etc., Co.*, 64 Fed. Rep. 928. These decisions have, in some instances, been rested upon the theory that the assets of a hopelessly insolvent corporation are a trust fund for the benefit of its creditors; while other courts have proceeded upon the ground of the danger of loss to the creditors and the evident inadequacy of the legal remedy. This departure from the general rule would seem a legitimate extension of equity's jurisdiction in accordance with the fundamental principle that equity grants relief where the remedy at law is inadequate.

DEDICATION — NATURE AND SCOPE — PRESUMED DEDICATION OF JUS SPATIANDI. — *Held*, that by user alone the public cannot acquire the right to

visit an historic monument on private grounds or to use a way leading to it through the owner's premises. *Attorney-General v. Antrobus*, [19c5] 2 Ch. 188. See NOTES, p. 55.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — POWER TO SELL IS NOT POWER TO MORTGAGE. — Executors, authorized to sell land, mortgaged it to the defendant, who had full knowledge of the facts. *Held*, that the estate is liable in equity to pay the mortgage debt. One judge dissented. *Thomas v. Provident Life & Trust Co.*, 138 Fed. Rep. 348 (C. C. A., Ninth Circ.).

A power to sell imports a power to sell "out and out," and will not justify a mortgage without positive evidence of such an intention. *Ferry v. Laible*, 31 N. J. Eq. 566; *Hoyt v. Jaques*, 129 Mass. 286. This is because the testator's intention was to effect a conversion of the property. *Haldenby v. Spofforth*, 1 Beav. 390. A sale is essentially distinct from incurring an indebtedness, and so it is said a power to sell negatives a power to mortgage. *Bloomer v. Waldron*, 3 Hill (N. Y.) 361, 368. But where the object clearly was that the property should be kept intact, subject only to raise a sum of money for a particular purpose, it is sometimes said that a power to sell will authorize a mortgage. *Loebenthal v. Raleigh*, 36 N. J. Eq. 169. No such purpose, however, appears here, and the case, therefore, seems squarely opposed to the general rule. The only basis found for the decision is a *dictum* by Lord Macclesfield, to which the subsequent cases in point are traceable. *Mills v. Banks*, 3 P. Wms. 1; see 2 CHANCE, POWERS, London ed. 1831, 388.

HIGHWAYS — RIGHTS OF ABUTTERS — RIGHT TO SHADE TREES. — The defendant negligently destroyed shade trees planted in front of the plaintiff's property by his predecessor in title. The plaintiff did not own the fee of the street, but the jury found that the market value of his property had been diminished. *Held*, that the plaintiff can recover. Three justices dissented. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313.

In jurisdictions which hold that the abutter owns the fee of streets, he obviously has title to shade trees growing therein and can recover for injuries to them. *Phifer v. Cox*, 21 Oh. St. 248. Where the fee is by statute or charter vested in the municipal corporation, courts have held that abutting owners have in the street rights to light, air and access. *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1. This right is defined as in the nature of an easement arising by operation of law by virtue of the proximity of the abutting property to the street. See *Kane v. New York Elevated R. R. Co.*, 125 N. Y. 164, 180. The principal case extends this doctrine and follows an earlier decision in which the plaintiff recovered for injuries to trees which he himself had planted. See *Lane v. Lamke*, 53 N. Y. App. Div. 395. The existence of this so-called easement, though dependent on the *fiat* of the court, seems to be practically desirable. The unlawful cutting of shade trees in a highway is deemed in equity irreparable injury. *Cf. Tainter v. Mayor of Morristown*, 19 N. J. Eq. 46, 58. The requirement that the abutter must have sustained peculiar damage in addition to that suffered by the public is supplied by the diminution in the market value of his property.

INFANTS — UNBORN CHILDREN — RIGHTS OF POSTHUMOUS CHILDREN UNDER CIVIL DAMAGE LAWS. — *Held*, that an act giving a right of action to any person damaged in his means of support in consequence of the unlawful sale of liquor applies to a child born after the death of its father resulting from such sale. *State ex rel. Niece v. Soale*, 74 N. E. Rep. 1111 (Ind., App. Ct.).

An unborn child has been uniformly denied a right of recovery for physical injuries negligently caused before birth. *Allaire v. St. Luke's Hospital*, 184 Ill. 359. Nor is such an infant regarded as a "person" under statutes similar to Lord Campbell's Act allowing suit by representatives of deceased persons. *Gorman v. Budlong*, 23 R. I. 169. These decisions are based on the ground that such a child is part of its mother. See *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14. It has been argued, however, that logical con-

sistency may be maintained by predicated a right to bodily integrity upon birth, a breach of which, though previously occasioned, does not arise until after parturition. See 15 HARV. L. REV. 313. However, statutes permitting children to recover for loss of support through death of their father are construed to apply to posthumous children. The right of support is regarded as a property right, and the analogy of cases, allowing unborn children equal property rights with living children, is followed. *Cf. Quinlen v. Welch*, 69 Hun (N. Y.) 584. While the principal case gives "person" a latitude it has not heretofore received, it is a statutory construction which does not encounter the objection of policy that would confront a recognition of the right to bodily integrity.

INJUNCTIONS — NATURE AND SCOPE OF REMEDY — ILLEGALITY AS AFFECTING PLAINTIFF'S RIGHTS. — The plaintiff collected continuous quotations from the floor of its produce exchange, and under a contract with a telegraph company distributed them to subscribers only. The defendant, though not a subscriber, in some way procured and was distributing plaintiff's quotations. *Held*, that he will be restrained from so doing. *Board of Trade of Chicago v. Christie Grain and Stock Co.*, 25 Sup. Ct. Rep. 637.

The jurisdiction of equity to protect such property as market quotations or news items has already been recognized. *Exchange Tel. Co. v. Gregory & Co.*, (1896), 1 Q. B. 147; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. Rep. 294. Several federal courts, however, have hitherto refused relief to this plaintiff on the ground that it was violating an Illinois statute against maintaining a place where the pretended buying and selling of stocks or produce is permitted. *Board of Trade of Chicago v. O'Dell Com. Co.*, 115 Fed. Rep. 574; *Board of Trade of Chicago v. Donovan Com. Co.*, 121 Fed. Rep. 1012. The Supreme Court concludes that such is not the case, and adds that even though it were, the fact would not be a defense to the present suit. This may be because the property right claimed is distinct and separate from any possible illegality in the conduct of the business. See *Fuller v. Berger*, 120 Fed. Rep. 274; 16 HARV. L. REV. 444. A further defense is disposed of by the holding that the contract of the plaintiff with the telegraph company is unnecessary to the course of action; but even if requisite it is said not to be in aid of a monopoly or in restraint of trade, as urged by the defendant.

INTERSTATE COMMERCE — INTOXICATING LIQUORS — WILSON ACT OF 1890. — A Missouri statute imposed a fee for an inspection of all intoxicating liquors within the state. As the cost of inspection was considerably less than the fee, the act produced a large revenue. *Held*, that under the Wilson Act the statute is not unconstitutional as applied to beer shipped from another state. *Pabst Brewing Co. v. Crenshaw*, 25 Sup. Ct. Rep. 552. See NOTES, p. 53.

LANDLORD AND TENANT — EVICTION — ACT DONE BY LANDLORD AS OWNER OF ADJOINING PREMISES. — The defendant leased a house and lot to the plaintiff for the purpose of conducting a saloon. Later, by virtue of his ownership of adjoining lots, the defendant signed a protest and prevented the plaintiff from obtaining a license. *Held*, that this does not constitute a constructive eviction. *Kellogg v. Lowe*, 80 Pac. Rep. 458 (Wash.). See NOTES, p. 50.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT OF PAYMENT BY LIFE TENANT AS AGAINST REMAINDERMEN AND DEVISEES. — The defendants were at once remaindermen after a life estate under a will, and devisees of other property. *Held*, that under a statute making real estate assets for simple contract debts of the deceased, part payment by the tenant for life under the will tolls the statute of limitations as against the defendants. *In re Chant*, [1905] 2 Ch. 225. See NOTES, p. 57.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — DEFECTIVE SCHOOLHOUSE. — The plaintiff, a pupil in a public school, sued the city for

damage suffered by falling from a negligently constructed stairway in the school building. *Held*, that she cannot recover. *Clark v. City of Nicholasville*, 87 S. W. Rep. 300 (Ky., Sup. Ct.).

In determining a municipal corporation's liability, courts make an important distinction between governmental and ministerial functions. For damage due to negligent exercise of the former, no common law liability exists. But in the case of the latter, the corporation is treated like a private person. See DILL, *MUNIC. CORP.*, 4th ed., § 949; 15 HARV. L. REV. 736. Thus a town is not liable for damage caused by faulty construction in a hall where a town-meeting is being held. *Eastman v. Meredith*, 36 N. H. 284. But it is liable for damage caused in a like manner when the building has been rented. *Worden v. City of New Bedford*, 131 Mass. 23. Though easily stated and illustrated, this principle is often difficult to apply. The authorities are not agreed as to what acts should be considered governmental. The maintenance of schools was certainly no part of the original conception of government. As conditions change, however, the state assumes new duties which become a part of its system of government conceived in a broad sense. The carrying on of schools may well be considered one of these new functions. What authority there is seems to be in harmony with this view. See *Sullivan v. City of Boston*, 126 Mass. 540; *Wixon v. City of Newport*, 13 R. I. 454.

RELEASE — CONSTRUCTION AND OPERATION — DEBTS DUE RELEASER UNDER ALIAS. — The defendant became indebted to the plaintiff, in two sets of transactions, the plaintiff figuring under his own name in one, and under an assumed name in the other. The defendant did not suspect the identity of his creditors. The plaintiff executed to the defendant a release, under his proper name, of all claims, but made no mention of his transactions under the alias. *Held*, that as the plaintiff had appeared in person to the defendant when he executed the release, it discharged all the debts due the plaintiff both in his proper name and under his assumed name. *Klopot v. Metropolitan Stock Exchange*, 74 N. E. Rep. 569 (Mass.).

We are concerned with the construction of a written document, the terms of which cannot be varied by parol. *Goss v. Ellison*, 136 Mass. 503. There is no ambiguous word or phrase. The debts were certainly all due to the plaintiff, thereby falling under the description in the instrument. Even though the circumstances showed conclusively that the parties contemplated only a release of the debts incurred to the plaintiff under his proper name, the words of the document cannot be held to express this restriction as a fair secondary meaning. It is improbable, also, that the plaintiff could obtain any relief in equity, as the mistake which he made was one of law, concerning the effect of the written release. *Cf. Durant v. Bacot*, 13 N. J. Eq. 201.

RELEASE — CONSTRUCTION AND OPERATION — GENERAL WORDS LIMITED BY PARTICULAR RECITALS. — The plaintiff, the victim of a collision, accepted a certain sum from the defendant railway and executed a release in which, after enumerating all the injuries of which he was aware, he discharged the defendant from all claims of any kind whatsoever for "the injuries and damages sustained" and for any results arising or to arise therefrom. Injuries more serious than those enumerated subsequently came to light, and for these the plaintiff brought suit. *Held*, that the release is no bar to his action. *Texas, etc., Ry. Co. v. Dashiell*, 25 Sup. Ct. Rep. 737.

A general release is construed strongly against the releaser and cannot be varied by parol evidence that only certain claims were known to the parties. *Kowalke v. Milwaukee, etc., Co.*, 103 Wis. 472. It has been intimated that equity will confine such a general release to claims of which the parties were aware. See *Blair v. Chicago, etc., Rd. Co.*, 89 Mo. 383. This should perhaps be limited to cases where there has been fraud or mutual mistake whereby unforeseen consequences were included. *Kirchner v. New Home, etc., Co.*, 135 N. Y. 182. But since all parts of a written instrument are construed together, general words of release following a statement of certain liabilities are usually

governed by the particular recitals, so that demands not mentioned stand undischarged. *Todd v. Mitchell*, 168 Ill. 199. The principal case, though construing "the injuries sustained" as "the injuries enumerated," goes upon this broader ground. Some courts except from the discharge only entire causes of action and allow no splitting up of any one suit. *Quebe v. Gulf, etc., Ry. Co.*, 81 S. W. Rep. 20. Others, with the decision at hand, allow subsequent recovery for injuries forming part of the same cause of action with those enumerated. *Union Pacific Ry. Co. v. Artist*, 60 Fed. Rep. 365. The strict construction is severe upon the releaser, but on the whole seems much safer in practice.

STARE DECISIS — OVERRULED DECISION — INTERFERENCE WITH LIGHT AND AIR BY ELEVATED RAILROADS. — After the New York Court of Appeals had decided that damage to easements of light and air pertaining to premises adjoining a highway constituted a "taking of property," the plaintiff bought land in New York City and erected a building thereon. Later the defendant began operating an elevated railroad in front of the plaintiff's premises. A decree was entered enjoining the use of this railroad unless damages were paid. From an adverse decision of the Court of Appeals dissolving the injunction, this appeal was brought. *Held*, that the plaintiff has a vested interest which cannot be impaired without compensation. Fuller, C. J., White, Peckham, and Holmes, JJ., dissented. *Muhlker v. New York, etc., R. R. Co.*, 197 U. S. 544.

The court based its decision on the ground that when the plaintiff acquired title the law of New York assured him that his easements were protected. *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268. The dissenting opinion, however, points out that it is questionable whether the plaintiff's property rights were infringed, as his easement of access was not interfered with. If, as seems likely, the New York court might originally have decided the question either way without encountering constitutional objection, there is force in the dissenting argument that it can now distinguish the plaintiff's case so as to limit the earlier doctrine. If, however, the case falls within the principle of *Lahr v. Met. El. R. R. Co.*, the decision is perfectly sound. The Supreme Court has already held that it will follow a state decision in reliance on which persons have made commercial contracts, though such decision has been subsequently overruled. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. The court hereby makes an important extension of this doctrine of *stare decisis* to rights of easements acquired under judicial decisions which have thereafter been adversely passed upon. See 15 HARV. L. REV. 667.

TAXATION — PROPERTY SUBJECT TO TAXATION — TRADE-MARK OF A FOREIGN CORPORATION. — A New Jersey corporation, in carrying on its business in New York, used a valuable trade-mark, which was taxed there as a part of its capital stock. The corporation objected on the ground that the trade-mark, being intangible, existed only at its domicile in New Jersey. *Held*, that the assessment is correct. *People ex rel. Spencerian Pen Co. v. Kelsey*, 93 N. Y. Supp. 971.

It is settled that intangible as well as tangible property is subject to taxation. *Carroll v. Perry*, 4 McLean (U. S.) 25. The difficulty is in assigning the property to some *situs*. The practical method and the tendency of the law are to tax intangible property at the place where it is used in connection with tangible property. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185. See 17 HARV. L. REV. 248. Thus, the prevailing view is that good-will is taxable within the state where it is exercised. *People ex rel. Journey, etc., Co. v. Roberts*, 37 N. Y. App. Div. 1. On the other hand, this same case holds that copyrights and patents, granted by the United States, are not subject to state taxation. Should the Federal Government, through its power over interstate commerce, assume a stricter control over trade-marks, it might well be urged that they should be classed with copyrights and patents. See AM. BAR ASS. REP., 1904, 547. As at present considered, however, a trade-mark is merely an element in a firm's good-will. The court, therefore, seems warranted in

extending the generally accepted doctrine of taxing good-will to the taxation of trade-marks in the state where they are used.

TORTS — INTERFERENCE WITH BUSINESS — INDUCING BREACH OF CONTRACT. — The executive council of the appellant union, which the members had asked for advice, ordered a holiday in order indirectly to raise the wages of members, but without ill-will toward their employers, the appellees. In consequence, the employees left work, in violation of their contracts. *Held*, that the union is liable for the resulting damage. *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239.

This decision is an affirmation by the House of Lords of the decision in the Court of Appeal, which was favorably commented upon in 17 HARV. L. REV. 63.

TROVER AND CONVERSION — WHAT CONSTITUTES CONVERSION — INNOCENT HOLDER OF CONVERTED MONEY. — The maker of a note took it up with stolen money at a local bank, and the amount, but not the identical funds, was forwarded to a distant bank, where the payee had deposited the note for collection. *Held*, that the payee has converted the money. *Porter v. Roseman*, 74 N. E. Rep. 1105 (Ind., Sup. Ct.). See NOTES, p. 55.

TRUSTS — LIABILITIES OF THIRD PARTIES — DEPOSIT TO HIS PERSONAL ACCOUNT OF CHECK MADE PAYABLE TO TRUSTEE. — An embezzling trustee deposited to his personal account in the defendant bank a check payable to him as trustee. *Held*, that the bank was not thereby put on inquiry, so as to render it liable for the embezzled moneys. *Batchelder v. Central National Bank*, 188 Mass. 25.

No court, certainly, could hold that, before cashing a check payable to a trustee, a bank must satisfy itself that the trustee will deal legitimately with the proceeds. See *National Bank v. Insurance Co.*, 104 U. S. 54, 63. But it does not follow that the bank may safely credit the check to the trustee's personal account. In the first case the proceeds may be used either in cash disbursements for the benefit of the trust estate, or to satisfy a debt of the estate to the trustee. In the second case, the former alternative is pretty conclusively negated. Nevertheless, the chances, in such a case, that the trustee is acting dishonestly are hardly great enough to warrant a rule of law that would so seriously interfere with the freedom of the commonest form of banking transactions. The court, therefore, seems justified in not assimilating the case to the rule in regard to the sale of promissory notes payable to, or the pledge of stock standing in the name of, trustees. See *Third National Bank v. Lange*, 51 Md. 138; *Shaw v. Spencer*, 100 Mass. 382. Cf. *Ashton v. Atlantic Bank*, 85 Mass. 217.

WILLS — MISTAKE — CONCLUSIVENESS OF RECITAL IN WILL AS TO AMOUNT OF ADVANCES. — A testator, after reciting in his will that a son owed him £5000, forgave him all but £3000, and directed that the portion of this amount remaining unpaid at his death should be deducted from the son's share. In fact only £80 had been advanced, and nothing repaid. *Held*, that only £80 can be deducted. *In re Kelsey*, 49 Sol. Jour. 701 (Eng., Ch. D., Aug. 2, 1905).

This decision raises a question upon which the authorities are in conflict. One line of cases, following the general rule that a duly executed will cannot be modified because of mistake, hold that the recital in the will of the amount of advances removes the necessity of resorting to extrinsic evidence and is conclusive. *In re Wood*, 32 Ch. D. 517; *McAlister v. Butterfield*, 31 Ind. 25. The opposing cases lay stress upon the general purpose of the will to divide the estate equally among the heirs and, disregarding the recital of the amount as repugnant to such purpose, admit evidence to show what has actually been advanced. *In re Taylor's Estate*, 22 Ch. D. 495. Although the latter view more nearly approaches the real intention of the testator, yet it would seem unsupportable on principle. As the will is clear upon its face in explicitly stating the amount of the advance, it is difficult to see on what grounds evidence can be admitted to prove the mistake. Cf. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109.

WILLS — REVOCATION — DIVORCE OF BENEFICIARY FROM TESTATOR. — A testator bequeathed a legacy to his wife describing her as such. After the execution of the will, but two years before the testator's death, the wife procured a decree of absolute divorce from him. *Held*, that the will is not impliedly revoked by the change of circumstances. Mitchell, C. J., dissented. *In re Jones' Estate*, 60 Atl. Rep. 915 (Pa.).

The English and American courts hold that a will is revoked by the subsequent marriage of the testator and the birth of issue, and that the revocation cannot be prevented by proof of extrinsic circumstances negating the existence of the intention to revoke. *Marston v. Roe*, 8 Ad. & E. 14; *Nutt v. Norton*, 142 Mass. 242. Several American decisions have refused to imply a similar revocation from the fact of divorce. *Charlton v. Miller*, 27 Oh. St. 298; *Card v. Alexander*, 48 Conn. 492. The opposite result was reached in a Michigan decision, where, however, the court relied somewhat on the fact of a settlement made by the parties subsequently to the decree of divorce. *Lansing v. Haynes*, 95 Mich. 16. To permit evidence of circumstances occurring after the divorce to determine the validity of the will would not harmonize with the previously stated doctrine of implied revocation by marriage. Moreover, neither the inference of a change of intention nor the grounds of public policy are sufficiently clear to warrant the introduction of a doctrine of implied revocation as a matter of law from the fact of divorce.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CONSTITUTIONALITY OF GENERAL ARBITRATION TREATIES. — In an article under this title Mr. Everett P. Wheeler makes a report in behalf of a committee of the American Bar Association, sustaining the constitutionality of general arbitration treaties. *The Constitutionality of General Arbitration Treaties*, 17 Green Bag 533 (Sept. 1905). Since the article contains little more than a mere statement of a general conclusion, it is of value chiefly because of the source whence it comes. The Hague Treaty of 1899 left the matter of arbitration entirely optional with the Powers, though a permanent court of arbitration was established. See FOSTER, ARBITRATION AND THE HAGUE COURT 42. Accordingly, in 1904, the President negotiated treaties with several of the Powers, whereby the contracting parties bound themselves to submit questions of a certain nature to the permanent court established at the Hague, in cases which might prove impossible of settlement by ordinary diplomatic methods. In the second article of each of these treaties it was provided, in accordance with Article XXXI. of the Hague Treaty, that, "in each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure." MOORE, TREATIES AND EXECUTIVE AGREEMENTS, 20 Pol. Sci. Quar. 385. For the word agreement in the instruments, however, the Senate substituted the word treaty. The incident closed with the President's refusal to acquiesce in this amendment. Whether the Executive has the constitutional power, independent of a general arbitration treaty, to conclude special agreements under the provisions of the Hague convention, has been much discussed. See FOSTER, THE TREATY-MAKING POWER UNDER THE CONSTITUTION, 11 Yale L. J. 69; HOLLS, THE PEACE CONFERENCE AT THE HAGUE 216; HYDE, AGREEMENTS OF THE UNITED STATES OTHER THAN TREATIES, 17 Green Bag 229. That he may constitutionally be given such a power by a general

arbitration treaty is the contention of Mr. Wheeler's committee, who maintain that no treaty-making power is thus delegated to the President; that though every treaty is an agreement, every agreement is not a treaty; and that the power of the President and the Senate to make treaties is not limited to the power to make special treaties only.

Mr. Wheeler's view seems to derive some support from a decision under the tariff act of Oct. 1, 1890, in which a somewhat similar question was involved. Section three of this act provided that whenever the President should be satisfied that the government of any country producing certain articles which were admitted free into the United States, imposed on products of the United States duties which he should deem reciprocally unreasonable, he should suspend the free introduction of these articles for such a time as he should deem just, during which time designated duties were to be paid. 26 U. S. STAT. AT L. 567. This was held constitutional. *Field v. Clark*, 143 U. S. 649. The court, after acquiescing in the general proposition that Congress cannot delegate its legislative power to the President, stated its position as follows: "It [the action of the President] was not making law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. . . . What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power." See BUTLER, TREATY-MAKING POWER OF THE U. S. § 465, note 1.

Following out the analogy of this decision, it would seem that, although the President and Senate cannot delegate to the President the treaty-making power, yet they can frame a general arbitration treaty, in which the President is made the mere agent of the treaty-making department. The treaty gives a general ratification in advance, delegating to the President, as executive, the power of determining what individual instances fall within the scope of the ratification, and of making the necessary arrangements for carrying out the provisions for arbitration.

RIGHT OF CITY TO REQUIRE MATERIAL FOR ITS PUBLIC WORKS TO BE DRESSED WITHIN STATE. — A recent article criticising a late decision of the Missouri Supreme Court has brought into prominence a very interesting question of interstate commerce. *Municipal Ordinances relating to Materials entering into Public Works which Interfere with Interstate Commerce*, by Eugene McQuillin, 61 Cent. L. J. 65 (July 28, 1905). An ordinance of St. Louis provided that only rock dressed within the state should be used in any of the city's public works. The court held that this ordinance was not in conflict with the commerce clause of the Federal Constitution, but was an exercise of a city's "reasonable right to select material for street improvements." *Allen v. Labsap*, 87 S. W. Rep. 926. This proposition Mr. McQuillin attacks, on the ground that a city's "reasonable right" does not justify an interference with interstate commerce, and that such an interference existed in the case under discussion. Mr. McQuillin leads up to this main point by a preliminary exposition of the elementary principles of interstate commerce, followed by the statement of several cases. A number of the decisions cited, however, seem not in point; among them, *People v. Coler* (166 N. Y. 144), on which chief reliance is placed. The opinion was to the effect that a state law requiring cities to adopt such ordinances as that of St. Louis is invalid under the commerce clause of the Constitution. There the state was prescribing conditions, not for itself in its rôle of proprietor, but for its cities. Nor does any question there arise of the reasonable right of a city to select material for its own works. The United States Supreme Court in the case of *Atkin v. Kansas* (191 U. S. 207) rendered a decision which applies very forcibly to the point under discussion. A state law requiring an eight-hour day on all the state's public works was held valid, on the ground that the state acting as a proprietor has the same right as an individual in prescribing the conditions under which work for it shall be done. If the Union Pacific, for example, were to declare that only ties dressed in

Missouri should be used on its roadbed in that state, there would surely arise no question of interference with interstate commerce.

The other cases cited by Mr. McQuillin hold invalid general state laws interfering with the inherent right to introduce goods from one state into another and to sell them in the general market. For example, the case of *Robbins v. Shelby Taxing District* (120 U. S. 489) declared unconstitutional a state law which put a license tax on all sales by drummers. The citation is not apposite, for St. Louis does not by its ordinance interfere with the sale to others of dressed rock from any source. The resulting reduction of the general market has no bearing on the constitutionality of the ordinance, since an individual or a corporation might easily use as large a proportion of dressed rock as does a single city. The fallacy in Mr. McQuillin's contention lies in the assumption that any one has an inherent right to compel St. Louis, for example, to accept his rock. No such right exists as against a city or state any more than it exists as against an individual or a corporation.

- ABATEMENT OF SMOKE NUISANCE IN LARGE CITIES BY LEGISLATIVE DECLARATION THAT DISCHARGE OF DENSE SMOKE IS A NUISANCE PER SE. *Eugene McQuillin*. Collecting and reviewing the authorities on the question whether such legislation is within the reasonable exercise of the state's police power. 60 Cent. L. J. 343.
- "AGENCY BY ESTOPPEL." *John S. Ewart*. Reply to Professor Cook, presenting estoppel theory in cases of agent's unauthorized action. 5 Columbia L. Rev. 354.
- AMERICAN LAWYER, THE. *Alfred Hemenway*. The annual address before the American Bar Association. 17 Green Bag 514.
- BASIS OF AFFIRMATIVE OBLIGATIONS IN THE LAW OF TORT, THE. II. *Francis H. Bohlen*. Full discussion of the line of cases headed by *Winterbottom v. Wright*. 53 Am. L. Reg. 273.
- BUYER'S RISK IN CLOSING A REAL ESTATE DEAL, THE—HOW TO ESCAPE IT. *Lemuel M. Ackley*. A practical and valuable suggestion. 38 Chic. Leg. News 11.
- CASE OF JOHN CHANDLER v. THE SECRETARY OF WAR, THE. *Gordon E. Sherman*. Tracing the origin of the power of our courts to declare laws unconstitutional, and giving early cases on that point. 14 Yale L. J. 431.
- CENTENARY OF THE FRENCH CIVIL CODE, THE. *Sir Courtenay Ilbert*. Touching incidentally the general question of codification. (Read before British Academy, 1904.) 6 J. Soc. Comp. Leg. N. s. 218.
- CERTAINTY AND JUSTICE. *Frederic R. Coudert*. Maintaining that the principle of "Stare Decisis" is being modified. Where public opinion has crystallized, the law is clear; elsewhere, as in labor questions, law is confused. 14 Yale L. J. 361. See 18 HARV. L. REV. 318.
- COMMON LAW IN FEDERAL JURISPRUDENCE, THE. *Thomas Dent*. Concerning the ownership of basins of non-navigable waters adjoining land granted by United States patents. 61 Cent. L. J. 123.
- CONDITIONS IN CONTRACT. *Clarence D. Ashley*. Distinguishing between express conditions, implied conditions, and limitations. 14 Yale L. J. 424.
- CONSTITUTIONALITY OF GENERAL ARBITRATION TREATIES, THE. *Everett P. Wheeler*. 17 Green Bag 533. See *supra*.
- CONTRIBUTION TO GENERAL AVERAGE. *H. Birch Sharpe*. Discussing how the obligation to contribute to general average arises in a policy of marine insurance. 21 L. Quar. Rev. 155.
- COVENANT TO REPAIR IN SUB-LEASES, THE. *H. C. M.* A valuable warning to sublessors to see that every sub-lease reserves a power to the lessor to enter and make repairs on the tenant being in default. 119 Law T. 285.
- CUSTOMS OF RAGUSA, THE. *P. Vinogradoff*. Being a review of a recent edition of the Statute of Ragusa. 21 L. Quar. Rev. 179.
- DECEASED WIFE'S SISTER, THE. *N. W. Hoyles*. Called forth by the prevalency in Canada of marriages with deceased wives' sisters and discussing the question from a legal and historical view-point. 41 Can. L. J. 345.
- DESTRUCTION OF NEUTRAL SHIPS BY A BELLIGERENT. *Hugh H. L. Bellot*. Maintaining that destruction of neutral ships by a belligerent cannot be justified by even the gravest necessity. 119 Law T. 193.

- DEVELOPMENT OF THE RULE IN *KEECH v. SANDFORD*, THE. *Walter G. Hart*. Treating the question how far a trustee of a lease purchasing a renewal or the reversion becomes a constructive trustee thereof for his *cestui*. 21 L. Quar. Rev. 258.
- DISQUALIFICATION OF EXECUTORS ON OTHER THAN STATUTORY GROUNDS—PERSONAL AND IMMORAL UNFITNESS. *John W. Smith*. Contending that such disqualification is an unwarranted interference with the testator's expressed desires. 61 Cent. L. J. 106.
- DO WE NEED A PHILOSOPHY OF LAW? *Roscoe Pound*. Discussing the growth and supremacy of the Common Law, and suggesting as a remedy for its present weakening a departure from the individualistic view. 5 Columbia L. Rev. 339.
- DURATION OF COPYRIGHT. *Samuel J. Elder*. Showing need of an extension of the term, and comparing our law with that of foreign nations. 14 Yale L. J. 417.
- ESTOPPEL BY ASSISTED REPRESENTATION. *John S. Ewart*. Treating of Agency by Estoppel. 5 Columbia L. Rev. 456.
- EXCLUSIVENESS OF THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE, THE. I. *James S. Rogers*. A review of the leading cases, arguing against the view that state power is concurrent. 53 Am. L. Reg. 529.
- FREEDOM OF CONTRACT. *Jerome C. Knowlton*. Discussing how far the right of the individual or municipality to contract may constitutionally be curtailed by the state. A résumé of the law. 3 Mich. L. Rev. 617.
- HAGUE COURT AND VITAL INTERESTS, THE. *Thomas Barclay*. Arguing for general arbitration treaties in matters affecting the "national honor or vital interests" of nations. 21 L. Quar. Rev. 109.
- INCORPORATION BY THE STATES. *Herbert Knox Smith*. Urging a national uniform law for the regulation of corporations. 14 Yale L. J. 385.
- INFLUENCE OF THE BAR IN THE SELECTION OF JUDGES THROUGHOUT THE UNITED STATES, THE. *Simon Fleischmann*. 13 Am. Law. 165, 199.
- IN HOW FAR MAY ACTS OF THE LEGISLATURE BE MADE CONTINGENT UPON BEING ACCEPTED BY POPULAR VOTE WITHOUT VIOLATING THE PRINCIPLE THAT LEGISLATIVE POWER CANNOT BE DELEGATED. *F. E. Williams*. Drawing the line between acts that affect the state as a whole, and local option laws submitted to the district affected. 61 Cent. L. J. 3.
- JURISDICTION OVER NON-RESIDENTS IN PERSONAL ACTIONS. *Edward Q. Keasbey*. Reviewing the English and American decisions. 5 Columbia L. Rev. 436.
- LABOR STRIKES AND INJUNCTIONS. *P. L. Edwards*. A review of the recent cases upon this subject. 67 Alb. L. J. 209.
- LAW OF BANK CHECKS, A PRACTICAL SERIES ON THE. *Anon.* 22 Banking L. J. 393, 393, 567.
- LAW OF THE CONSTITUTION IN RELATION TO THE ELECTION OF PRESIDENT, THE. *J. Hampton Dougherty*. A critical discussion of the provisions of the Constitution relating to the election of President. 67 Alb. L. J. 195.
- LAW'S DELAYS, THE—CAN THEY BE OBIATED? *William Lambert Barnard, etc.* Containing a statement of comparative conditions in England, France, and Italy, with a discussion of the applicability of foreign methods to the United States. 17 Green Bag 261, 265, 268.
- LAW AS TO AN EMPLOYER'S LIABILITY AND WORKMEN'S COMPENSATION, PRIZE ESSAY ON THE. *John Hall*. Discussing the construction of the acts and their scope. 27 L. Stud. J. 178.
- LAW CONCERNING MONOPOLISTIC COMBINATIONS IN CONTINENTAL EUROPE, THE. *Francis Walker*. Comparing various attempts at curative legislation, and the causes of their failure. 20 Pol. Sci. Quar. 13.
- LEGACIES TO SERVANTS. *C. B. Labatt*. A short treatment in text-book style, with useful statement of cases. 41 Can. L. J. 425.
- LEGAL RIGHTS IN THE REMAINS OF THE DEAD. *Frank W. Grinnell*. A highly interesting discussion, with full citation of the authorities, of the right and manner of disposing of dead bodies. 17 Green Bag 345.
- LIABILITY OF WATER COMPANIES FOR FIRE LOSSES—ANOTHER VIEW. *Albert Martin Kales*. Restating the prevailing doctrine that the property owners cannot sue. 3 Mich. L. Rev. 501.
- LIMITATION OF HOURS OF LABOR AND THE FEDERAL SUPREME COURT. *Ernest Freund*. Severely criticising the recent case of *People v. Lochner*. 17 Green Bag 411.
- MANDAMUS AGAINST A GOVERNOR. *Edward J. Myers*. Arguing that the writ should not issue against the governor of a state. 3 Mich. L. Rev. 631.
- MARITIME CONFERENCE, THE. II. *Anon.* Commenting upon the work of the recent conference and the problems which confront it in its endeavor to establish a uniform maritime code for all nations. 119 Law T. 263.

- MARITIME LAW AND JURISDICTION IN AUSTRALIA. *F. L. Stow*. 2 Commonwealth L. Rev. 157.
- MEDICAL EXPERT EVIDENCE. *Lucilius A. Emery*. Deploping the present unsatisfactory condition of medical expert testimony and favoring court experts as supplementary to the present party experts. 39 Am. L. Rev. 481.
- MOST INTERESTING CHANCERY SEQUEL TO A NOTED INSURANCE CASE AT LAW, *A. Robert J. Brennan*. Commenting adversely on the decision in *Northern Assurance Co. v. Ass'n*, 183 U. S. 308, holding that there can be no waiver by the insurer of a forfeiture clause when the insured is aware of the breach of the condition, and commending the contrary holding in *Grand View Ass'n v. Assurance Co.*, 102 N. W. 246. 60 Cent. L. J. 484.
- MUNICIPAL ORDINANCES RELATING TO MATERIALS ENTERING INTO PUBLIC WORKS WHICH INTERFERE WITH INTERSTATE COMMERCE. *Eugene McQuillin*. 61 Cent. L. J. 65. See *supra*.
- NEW GERMAN CODE, THE. *F. P. Walton*. A comment upon the new German Code explaining briefly the legal system which it superseded and noticing the points in which it differs from English law. 4 Can. L. Rev. 372.
- NOTES ON MAINE'S "ANCIENT LAW." *Sir Frederick Pollock*. 21 L. Quar. Rev. 165, 274.
- NOTEWORTHY CHANGES IN THE STATUTE LAW OF THE YEAR. *Henry St. George Tucker*. Extracts from the Address of the President of the American Bar Association. 17 Green Bag 523.
- PARLIAMENT OF NATIONS, A. *Hayne Davis*. Discussing the movement toward general international arbitration. 12 The Bar, No. 4, 35.
- PHILIPPINE PENAL CODE, THE. *Richard W. Young*. Commenting upon the comparatively limited discretion of Philippine judges in imposing penalties. 13 Am. Law. 147.
- POWER OF A STATE TO FORBID THE TRAFFIC IN OR THE POSSESSION OF WILD GAME AND FISH WHEN BROUGHT IN FROM ANOTHER STATE OR COUNTRY AS AFFECTING INTERSTATE COMMERCE, THE. *Eugene F. Law*. Review of the authorities, and criticism of the decisions holding that a state has the right to prohibit such traffic. 60 Cent. L. J. 324.
- PRACTICE WORK IN LAW SCHOOLS. *James Parker Hall*. Its advisability discussed in a paper before the Association of American Law Schools. 17 Green Bag 528.
- RECOVERY OF MONEY PAID UNDER MISTAKE OF LAW. *Frederic C. Woodward*. Suggesting exceptions to the general rule of non-recovery, and offering a test. 5 Columbia L. Rev. 366.
- RIGHT OF A THIRD PARTY UNDER A CONTRACT INTER ALIOS. *A. C. Galt*. An article stating the law in England and Canada, with a collection of the cases in point. 4 Can. L. Rev. 364.
- SCHEME OF COPYHOLD ENFRANCHISEMENT, A. *H. J. Randall*. Suggesting an act abolishing copyhold tenures and converting them into freeholds. 21 L. Quar. Rev. 150.
- SOME CHANGES EFFECTED BY THE NEGOTIABLE INSTRUMENTS LAW IN MISSOURI. *J. M. Blayney, Jr.* Indicating the changes that the act may be expected to produce in the law of Missouri. 60 Cent. L. J. 363.
- SUBJECT OF "NO PROTEST," THE. *Anon.* A practical discussion. 22 Banking L. J. 311.
- THEORY AND PRACTICE IN THE LAW OF BAILMENTS. *Victor D. Cronk*. A brief criticism of the theory that there are three degrees of care in the Law of Bailments. 67 Alb. L. J. 135.
- TRUE CRITERIA OF CLASS LEGISLATION, THE. *Andrew Alexander Bruce*. Maintaining that the true test of class legislation is "whether or not by that legislation any person is hindered in his struggle or competition with his fellow men." 60 Cent. L. J. 425.
- WHEN WILL AN INNKEEPER'S LIEN FOR THE BOARD AND LODGING OF HIS GUEST EXTEND TO THE PROPERTY OF THIRD PERSONS BROUGHT TO THE HOTEL BY THE GUEST? *Walter J. Lots*. Discussing the question whether the common law rule giving innkeepers a lien in such cases, is taking property without due process of law. 61 Cent. L. J. 43.
- XVI (XIV?) AMENDMENT—ITS HISTORY AND EVOLUTION, THE. I. *John W. Judd*. 13 Am. Law. 338.

II. BOOK REVIEWS.

WHARTON AND STILLÉ'S MEDICAL JURISPRUDENCE. Volume I. Mental Unsoundness. Legal Questions by Frank H. Bowlby. Insanity: Forms and Medico-Legal Relations, by James Hendrie Lloyd. Volume II. Poisons. By Robert Amory and Robert L. Emerson. Volume III. Physical Conditions and Treatment. Medical Aspects by Truman Abbe; Legal Aspects by Frank H. Bowlby. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1905. pp. clv, 1031; xxx, 858; lxxix, 692. 8vo.

Published originally in 1855, Wharton and Stillé's work on Medical Jurisprudence has since that time been considered standard. Witthaus and Becker on Medical Jurisprudence, Forensic Medicine, and Toxicology, published in 1894, in four volumes, is the only other exhaustive American work in this field. The two books differ, however, in form. Witthaus and Becker' is rather in the nature of an encyclopedia than of a treatise, the several chapters and sections being written by different distinguished practitioners in law and in medicine in collaboration with the editors. The first edition of Wharton and Stillé, consisting of one volume of eight hundred pages, was divided into six books: Book I. Mental Unsoundness; Book II. Questions relative to the Foetus and the Unborn Child; Book III. Questions arising out of the Difference of Sex; Book IV. Questions relative to Identity; Book V. Questions relating to the Cause of Death, Part I. Poisoning, Part II. Other Forms of Violent Death; Book VI. Legal Relations of Homicide, Foeticide, and Infanticide. No important change was made in the arrangement or text of the treatise until the third edition, which was issued in 1873 in three volumes. The first volume then was given over entirely to Mental Unsoundness, a subject which had been covered in one of the six books of the first edition. Since that time the treatise has appeared in three volumes. Between the third edition and the present fifth edition, one other noteworthy change occurred. So much new material had been accumulated, and so much greater medical knowledge of poisons acquired by the editors, that in the fourth edition it was found necessary to devote the second volume entirely to the subject of Poisons. This was largely the work of the late Professor Edward S. Wood of the Harvard Medical School, the well-known expert, and is on that account of exceptional value.

The division into volumes in the present edition is similar to that in the preceding; but so many changes have been made in the separate volumes that the whole is almost a new work. Volume I. on Mental Unsoundness has been increased very greatly in size, comprising now about 1000 pages, and thus in itself being larger than the first edition of the entire treatise. The chapters I.-XX. on the jurisprudence of insanity are for the most part new work, the text having been rewritten with many new citations by Mr. F. H. Bowlby of the publishers' editorial staff. Under the heading, "Mental Unsoundness in its Legal Relations," Mr. Bowlby states the law as represented by the decisions of the courts, and considers the effect of lunacy, intoxication, morphinism, and other addictions in questions of contracts, marriage, divorce, wills, gifts, life insurance, torts, offices of trust, settlement and domicile. Further attention is given to insanity and intoxication as defenses to crime; and the rules of evidence on these several subjects are set forth at length.

The remaining chapters of the volume, XX.-LIX., on Forms and Medico-Legal Relations of Insanity, are new work by Dr. James Hendrie Lloyd. These chapters are written from the viewpoint of the scientific expert. After a discussion of general definitions of insanity, and of general principles of law in relation thereto, all the various possible forms of mental unsoundness are treated in turn, defined, explained, and illustrated by actual cases. In this volume citation is made to approximately 4500 cases.

The second volume, on Poisons, is edited by Dr. Robert L. Emerson and by Dr. Robert Amory, who was associated with the late Professor Wood in the preparation of the fourth edition. The same general plan has been followed in this edition, but certain methods for the detection of poisons, now deemed

obsolete, are omitted; and there have been added some new chapters on ptomain poisoning, and on the detection of blood stains, as well as some special work on Wood Alcohol by Dr. F. M. Spalding. The classification of poisons in this edition is made according to their chemical and physical relations rather than by the similarity of symptoms following their use. An appendix contains full statements of some of the more important cases of poisoning which have come before the courts, illustrating either the symptoms produced by the use of the several poisons or the methods employed in the detection of poisoning. The law of Massachusetts on Medical Examiners, the law of Connecticut on Coroners, and the United States Report on Boric Acid, are also included in the appendix.

In the third volume, entitled "Physical Conditions and Treatment," the legal aspects of the subject have been treated by Mr. Bowlby; the medical, by Dr. Truman Abbe. Nothing of the fourth edition has been omitted, but the material has been considerably rearranged. The distinctly new work consists of some chapters on the effects of electricity; and chapters on the rights, duties, liabilities and legal limitations of physicians and surgeons in their personal relations, as well as in all situations arising from their acts.

There are ample footnotes to the important statements in the several volumes giving citations to the works of men in this country and abroad who have devoted special attention to this particular branch of legal study. At the end of each one of the three volumes is a complete analytic index, making it possible to use each volume independently. Generally speaking, treatises on medical jurisprudence lay so much stress on points arising in criminal practice that the very interesting questions which become of importance in civil cases are unduly slighted. In Wharton and Stillé this tendency, originally less apparent than in other books, grows less with succeeding editions. The growth of that portion of the work dealing with mental unsoundness is an illustration. For this reason the work should appeal to a larger class of readers; and despite the fact that Continental writers have made far more extensive researches in the field which it covers than English and American jurists, it is entitled to rank well among the general treatises of the present day.

S. H. E. F.

A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW.

By Francis Wharton. Third edition, by George H. Parmele. In two volumes. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co. 1905. pp. ccxxiv, 1-848; xxvii, 849-1830. 8vo.

The present edition of Wharton's *Conflict of Laws*, although a great improvement upon its two predecessors in its handling of the various topics considered, is, nevertheless, handicapped by Mr. Wharton's illogical and unscientific treatment of the subject. A most careful examination of the author's division of the questions involved in the *Conflict of Laws* fails to disclose anything remotely resembling a plan which he has followed. All topics, especially the law governing contracts, are in a state of confusion, the inevitable result of jumbling together the creation, recognition, and enforcement of rights.

The subject of jurisdiction, for one, as faulty in the present edition as in the past, is neither thoroughly grasped nor adequately treated. The editor supports the general trend of decisions in holding that the law to govern the creation of contracts is the law which the parties intend. He further urges that, in the absence of any expressed intention to the contrary, the law of the place of performance should govern, since that state is the one most interested in the contract. This position is due largely to the failure to distinguish clearly between the creation and the enforcement of the contractual obligation, and also to a misapprehension of the common law notion of the essential nature of law. For, according to the common law, law can have no extra-territorial effect. Since a contract is an agreement to which the law attaches an obligation, a state can attach an obligation only to acts committed within its borders. To

say that the law intended by the contracting parties should govern the creation of a contractual obligation is just as reasonable as to hold that a person who commits a tort with the intention of being governed by the laws of the state where such acts do not constitute a tort, is therefore not liable. Moreover, if the laws of the state intended by the parties govern the creation of contracts, how can that state be deprived of its jurisdiction by any legislation by the state where the acts are committed? One state having attached an obligation to certain acts, another state can by no amount of legislation affect its right to do so. Yet the law is, that where a state enacts a special law the intent of the parties will not govern.

This unscientific treatment, which vitiates the whole work, has led to many inaccuracies in the editor's treatment of the subjects of marriage (see § 237 b), and the status of legitimated children (§§ 250-251). While every state must recognize a status created by the proper law, yet the consequences that arise in any jurisdiction must depend upon the law of that jurisdiction.

In § 230 a the editor argues that although a divorce granted by a state where a party merely resides is void, yet a statute which expressly substitutes residence for domicile thereby overcomes the general principle that the law of the state where the party is domiciled governs. Why this should be so, the editor gives no reason. An action for divorce is an action *quasi in rem*, and the only state having jurisdiction over the status which is the subject of the action is the state where the parties are domiciled. How, then, can a state acquire jurisdiction over that status as long as neither of the parties is domiciled there? It is because it cannot, that a voluntary appearance by the parties does not confer jurisdiction. *Andrews v. Andrews*, 188 U. S. 14.

Again, in §§ 4 b and 257 a, the editor upholds the view that a judgment recovered under a penal statute cannot be enforced in another jurisdiction. This is due to the loose method of statement adopted by some courts in saying that a judgment is merely evidence of the existence of an obligation. The truth is, that the judgment merges the original obligation. An action can be brought on the judgment; it has a distinct statute of limitations, and defenses available in the original action cannot be pleaded in an action on the judgment. Suppose, instead of bringing an action on the penalty, the parties had made a contract, whereby, in consideration of the one releasing the other from his obligation, the other agreed to give a horse; no doubt such a contract would be enforceable everywhere. Why should there be any difference whether the new contractual obligation is created by assent of the parties, or by operation of law, since a judgment is a quasi-contractual obligation? Upon this ground *Huntington v. Attrill*, 146 U. S. 657, may be supported.

While the editor of this new edition has done his work with zeal and ability, no amount of editing can overcome the defects inherent in Wharton's Conflict of Laws. Whether a consciousness of the inadequacy of the original, or a large public demand for a work on this subject, or both, led to this new edition, the question still remains why so unscientific a work on the most scientific branch of the law should be deemed worthy of a new edition.

S. J. R.

THE CIVIL CODE OF THE REPUBLIC OF PANAMA, and Amendatory Laws, Continued in Force in the Canal Zone, Isthmus of Panama, by Executive Order of May 9, 1904. Translated under the direction of Charles E. Magoon, General Counsel, Isthmian Canal Commission, by Frank L. Joannini. Washington, D. C.: Isthmian Canal Commission. 1905. pp. xvi, 681. 8vo.

Upon the declaration of its independence in November, 1903, the Republic of Panama, by proclamation, continued in force the pre-existing law, with such modifications as the political changes effected might require. The Panama code is, consequently, substantially identical with that of Colombia, and like the latter is Spanish in origin and development, being based upon the Roman law.

In May, 1904, an executive order of the United States government continued in force in the canal zone the laws of the state of which it had previously formed a part, thus increasing still further the already considerable area of American territory in which the civil law system prevails. Mr. Joannini's translation, for which he claims the merit of uniqueness, must therefore interest the practical American business man and lawyer as well as the student of comparative jurisprudence. The volume is unannotated save for occasional references to the civil codes of Louisiana and Chili. An historical introduction contains a brief statement of the various bodies of law which have prevailed in the territory now known as the Republic of Panama since its original colonization. In November, 1903, the new Republic provided for the appointment of commissions to draw up civil, judicial, commercial, and mining codes. This work has not yet been brought to a conclusion, however; and pending its completion the present translation of the law now prevailing seems likely to be useful.

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EQUITABLE CONVERSION.¹

V.

AT the beginning of the preceding article,² it is stated that, previous to *Ackroyd v. Smithson*, it was held that the land of a deceased person which had been converted in equity into money by his will became in consequence assets for the payment of his debts, and that the money of a deceased person which had been converted in equity into land by his will ceased in consequence to be assets for the payment of his debts. To understand the full force of this statement, the reader must remember that previous to 3 & 4 Wm. 4, c. 104, the land of a deceased person was not in England assets for the payment of his simple contract debts, so that the effect of the foregoing statement is that a testator could by converting his land into money by his will, enable his simple contract creditors to obtain payment out of his land of what was due to them respectively, though by law such creditors would go unpaid unless the testator left sufficient personal estate to pay them; and so that a testator could, by converting his money in equity into land by his will, deprive his simple contract creditors of the right which the law gave them to be paid out of such money what was due to them respectively. That the courts should have held that the conversion of land into money by will made the land available for the payment of all the testator's debts is not surprising, but that they should have held that the conversion of money into land by will enabled a testator to deprive his simple contract

¹ Continued from 19 HARV. L. REV. 29.

² 19 HARV. L. REV. 1.

creditors of their legal right to be paid out of his money is very surprising. That such was, however, held to be the law, there seems to be no doubt, though the reported cases¹ are not very conclusive. Are these cases justified by the authorities which decided that land converted into money by will devolved as money at the death of the testator, and that money converted into land by will devolved as land at the death of the testator? No, it seems not, for the latter did not involve holding that an equitable conversion by will takes place prior to the testator's death, while it seems clear that the question whether any particular property of a deceased person is or is not assets for the payment of his debts depends upon the quality of that property when the testator dies. To hold, therefore, that the land of a deceased person is assets for the payment of his simple contract debts because it was converted in equity into money by his will, is to hold that the conversion took effect during the testator's lifetime, — which is impossible. To hold that the money of a deceased person is not assets for the payment of his simple contract debts, because it was converted in equity into land by his will, is to hold that a testator can effect, by converting his money into land by his will, what he could not effect by a direct and absolute bequest of the money.

In *Sweetapple v. Bindon*,² in which a testator directed his executor to lay out £300 in the purchase of land, and to settle the land (as the court held) upon the testator's daughter in tail, and the daughter married and had issue, but she and her issue were both dead, and the money not having been laid out, her husband filed a bill to have the money laid out and the land settled on him for his life, as tenant by the curtesy, or to have the interest of the money paid to him during his life, the court decreed the money to be considered as land, and the plaintiff to have it for life as tenant by the curtesy. But, though the case seems always to have been regarded as well decided, it seems impossible to support it on principle. If the money had been laid out during the daughter's lifetime, of course there would have been no difficulty, even though the land had not been settled on the daughter as directed, but, after the death of the daughter and her issue, there was no one who could compel the executor to lay the money out,

¹ *Fulham v. Jones*, 2 Eq. Ca. Abr. 250, pl. 3, 296, pl. 7, 298, pl. 10, note, 7 Vin. Abr. 44; *Whitwick v. Jermin*, cited in *Earl of Pembroke v. Bowden*, 3 Ch. [217] 115, 2 Vern. 52, 58; *Gibbs v. Ougier*, 12 Ves. 413.

² 2 Vern. 536.

—not the husband, as he was not one of those for whose benefit the duty was imposed upon the executor.

The courts would also undoubtedly have declared that, on the death of a husband, who is entitled to have money laid out in the purchase of land, and to have the land settled upon him in tail in possession, his wife would be entitled to dower, but for the rule which disables a wife from being endowed out of an equitable interest. This view is, however, open to the same objection as the decision in *Sweetapple v. Bindon*.

In a former article, when speaking of the ordinary bilateral contract for the purchase and sale of land I stated¹ that that was the only species of contract "in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made."

It seems desirable that the two statements contained in this passage should be a little enlarged upon. 1. The only other species of contract in which it is certain that an agreement to buy or sell land forms an element in an equitable conversion is a unilateral covenant to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale, and we have seen² that a covenant to lay out money in the purchase of land or to sell land, will not cause an equitable conversion nor even constitute a binding contract, unless it be followed up by a covenant to settle the land to be purchased, or the proceeds of the land to be sold. Why, then, is this difference between a bilateral contract to buy *and* sell land, and a unilateral covenant to buy *or* sell land? It is because of the different effect produced by the performance of the two contracts. The mutual performance of the bilateral contract causes a conversion, not only of the seller's land into money, but of the buyer's money into land, and also causes a transfer, not only of the seller's land to the buyer, but of the buyer's money to the seller. On the other hand, the performance of the unilateral covenant, from the fact that the covenant is only unilateral, cannot possibly cause more than one conversion nor more than one transfer. Does it do as much as that? It does cause a conversion of the covenantor's money into land, or of his land into money, and it does, in a sense, cause a transfer of the

¹ 18 HARV. L. REV. 251.

² 18 HARV. L. REV. 256-7.

money or land, but not in such a sense as to make the covenant a first step towards such transfer; for the transfer which a performance of the covenant causes is to a stranger to the covenant, and it may, therefore, in respect to the effect produced by the covenant and by its performance, be regarded as a mere accident; for the reader must remember that the covenant is not to buy land of the covenantee, nor to sell land to him, but is to buy land of, or to sell land to, some third person not a party to the covenant, nor ascertained by it. It is true that the performance of the covenant will involve the purchase or sale of land, and so will practically involve, not only the making, but the mutual performance, of a bilateral contract for the purchase or sale of land, but the only effect of such purchase or sale upon the covenantor will be to make him the owner of the land instead of the money, or of the money instead of the land, and thus to place him in a situation to settle the land or the money, just as if he had purchased or sold the land before he made the covenant,—in which case the covenant would of course be only to settle the land purchased, or the proceeds of the land sold. It will be seen, therefore, that, in the case of a unilateral covenant to purchase and settle land, or to sell land and settle the proceeds of the sale, while it is the purchase or sale of the land which causes the conversion, it is the settlement of the land or money which causes the transfer or alienation without which the covenant cannot create an equitable conversion. In order, therefore, that a unilateral covenant to buy or sell land may cause an equitable conversion, it must be a covenant to buy land of the covenantee, or to sell land to him, or there must be added, to the covenant to buy or sell land, a covenant to make a gift of some portion of the land to be purchased, or some interest therein, or of some portion of the proceeds of the land to be sold, or of some interest therein. The only instance of the latter that occurs to me is the covenant, already referred to, to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale; and the only instance of the former that occurs to me is the unilateral contract to sell land which is commonly known as the giving of an option.¹ Such a contract is a unilateral agreement to sell land at the price, and on the terms, stated in the contract, without any agreement by the other party to the contract to purchase the land. The payment of the price,

¹ 18 HARV. L. REV. 10 *et seq.*

therefore, is merely a condition of the latter's right to have the land. Still, such a contract would seem, in theory, to cause an equitable conversion in favor of the holder of the option, but, in the case of the latter's death, the only right that would devolve upon any one would be the conditional right to have the land on paying the price, and whether that right would devolve in equity upon the heir or the personal representative of the deceased is at least doubtful, and I am not aware that there is any authority on the point.

2. The other statement contained in the passage quoted above is that a contract for the purchase and sale of land furnishes the only instance of an equitable conversion which is always coextensive with the actual conversion agreed or directed to be made. Why is the equitable conversion caused by such a contract always coextensive with the actual conversion which the performance of the contract involves? Because the reason why such a contract causes an equitable conversion, or rather two equitable conversions, is that its performance involves two alienations as well as two actual conversions, and these two alienations and two actual conversions are made by the same two acts, one performed by each of the two parties to the contract, namely, a delivery of a deed of conveyance of the land by the seller to the buyer, and a delivery of the price of the land by the buyer to the seller. Plainly, therefore, the thing which the seller converts into money is the same as the thing which he alienates to the buyer, and the thing which the buyer converts into land is the same as the thing which he alienates to the seller. It may be added that these two acts regularly take effect at the same instant of time, and hence the two alienations and the two actual conversions are regularly made at the same instant of time.

Why is it that no other equitable conversion is necessarily coextensive with the actual conversion required to be made by the covenant or direction which causes the equitable conversion? Because, in every other case, the actual conversion of land into money, or of money into land, must be made before any gift of the money or land into which the conversion is made can take effect; and, as it is the latter alone that causes the equitable conversion, it necessarily follows that the extent of the equitable conversion is measured by the extent of such gift and not by the extent of the actual conversion.

It is proper, however, to mention another species of agreement

which has been held to cause an equitable conversion of land into money, namely, the agreement which is sometimes made by each of several co-owners of land with the other co-owners to join the latter in making a sale of the land.¹ If it is true that such an agreement converts the land into money in equity, it seems to be another instance of a contract which converts land into money without any gift of the money into which the land is to be converted, and it seems also that the equitable conversion which it causes will always be coextensive with the actual conversion which is contracted to be made. It is clear, however, that such an agreement does not cause any equitable conversion whatever. To suppose that it does is to confound an agreement by each of several co-owners of land with all the others to join the latter in selling the land to some person not yet ascertained, — to confound such an agreement with an agreement by all such co-owners to sell the land to some ascertained person; and even the latter agreement will not cause an equitable conversion of the land into money without an agreement by the other party to the contract to purchase the land. Without the latter, the agreement will merely give an option to purchase the land, and its utmost effect, in the way of causing an equitable conversion, will be to convert the money of the person receiving the option into land in equity. The only way in which one can convert his own land into money in equity in his own favor is by procuring some one else to contract with him to purchase the land. Even in the case of a bilateral contract for the purchase and sale of land, it is, as we have seen, the purchaser's side of the contract that converts the seller's land into money in equity, while it is the seller's side of the contract that converts the purchaser's money into land in equity. It is a mistake, moreover, to suppose that the agreement in question is a contract to sell the land. If it were, the next step would be to convey the land, whereas, in fact, the next step is a bilateral contract between all the co-owners of the land and an ascertained purchaser for the purchase and sale of the land; and, of course, it is this contract that causes an equitable conversion of the land into money. It may be added that it is by no means an easy task so to frame an agreement, like that in question, that it can be enforced in a court of law, and it is believed that no in-

¹ *Hardey v. Hawkshaw*, 12 Beav. 552; *In re Stokes*, 62 L. T. 176; *Darby v. Darby*, 3 Dr. 495.

telligent person will seriously contend that such an agreement can be specifically enforced in equity.

In a former article,¹ I have considered several important distinctions, having no direct connection with equitable conversion, between a direction to sell land accompanied by a gift of the proceeds of the sale, or of some part thereof, or of some interest therein, and the creation of a lien or charge on the same land, either with or without a direction to sell the land to satisfy the lien or charge. There is, however, another important and radical distinction between these two things which has exclusive relation to the creation of an equitable conversion,—so radical indeed that, while the former always causes an equitable conversion, the latter never does. This being so, it is indispensable that the two things be accurately distinguished from each other. Fortunately, too, it is possible to distinguish them with entire accuracy, though they seldom, if ever, have been so distinguished. How, then, is the distinction to be made? 1. A gift out of the proceeds of a sale of land, though it may be of either a limited or an absolute interest, must always extend either to the entire proceeds of the sale, or to some fractional part thereof, and hence such a gift always makes a sale of all the land necessary, as it is only by a sale of all the land that the amount of money to which the gift will extend can be ascertained. 2. Where land is charged with the payment of money the amount of money which constitutes the charge bears no relation to the value of the land or to the price for which it will sell, and hence a sale of the land can never be necessary to ascertain the amount of the charge, nor will a sale of the land even aid in ascertaining its amount. How, then, shall the amount of the charge be ascertained? He who makes the charge must at his peril fix its amount or furnish the means of fixing it. For example, if the charge consists of a sum of money given, by the deed or will which creates the charge, to a person named, the usual and proper mode of fixing the amount of the charge is by naming the amount of the gift in lawful money. If the charge be made by will, and consist of all the testator's pecuniary legacies, the amount of the charge will be ascertained by adding together all the pecuniary legacies contained in the will and in the codicils thereto, if any. If the charge be created by a will, or by a deed of assignment, and consist of all the tes-

¹ 18 HARV. L. REV. 83 *et seq.*

tator's or assignor's debts, the amount of the charge will be ascertained by adding together such debts as the testator or assignor shall be proved to have owed when he died, or when he made the deed of assignment. Or, instead of charging "all his debts" he may of course charge only such debts as he shall specify in the will or deed, and, in that case, the will or deed will be conclusive both as to the number of debts and as to the amount of each.

Why does a lien or charge on land never cause an equitable conversion of the land into money? 1. Because it never constitutes any step towards the alienation of the land. When a sale of land is directed, and a gift is at the same time made out of the proceeds of the sale, to A, for example, and the land is afterwards sold pursuant to the direction, an immediate consequence of the sale is that the proceeds, to the extent of the gift, become the property of A, at least in equity, and that is of course, by virtue of the previous gift to him, which, however, remains executory till the sale is made. On the other hand, when land is merely charged with the payment of money to A, for example, and the land is afterwards sold, whether for the purpose of satisfying the charge or not, the ownership of the proceeds of the sale will be just where it would have been if the charge had not been made, and no part of such proceeds will be the property of A,—whose right against such proceeds will be precisely the same as his right against the land before it was sold, *i. e.*, he will have a lien or charge on such proceeds for the sum of money coming to him. 2. If a charge of land with a payment of a debt causes an equitable conversion of the land to the extent of the debt, it must be because of the direction to sell the land¹ which is supposed to accompany the charge; and yet such a direction is wholly unnecessary, the charge being complete without it. A direction, indeed, to sell land, and apply the proceeds of the sale to the payment of a certain debt, will of itself constitute a charge of the debt upon the land, but it is only as evidence of an intention to make a charge that such a direction is material. Besides, when an owner of land charges the same with the payment of a debt, his power over the land is, to the extent of the charge, entirely suspended, and will remain suspended till the charge is removed, and, therefore, the addition of a direction to sell the land is, for

¹ For it is only by an agreement or direction to sell, that land can be converted indirectly into money. *Hyett v. Mekin*, 25 Ch. D. 735. And see 19 HARV. L. REV. 25, proposition 9.

that reason, without meaning. The owner of the charge can require the land to be sold whenever there is a default in the payment of the debt, but that is because of the charge, — not because of a direction to sell the land. It cannot, therefore, be said, with any propriety, that, in any case where an owner of land charges it with the payment of a debt, and the land is afterwards sold for the satisfaction of the charge, the sale takes place by virtue of a previous direction by the owner of the land; and hence the making of the charge cannot cause an equitable conversion of the land into money. 3. When land is charged with the payment of a debt the debt has an independent existence, and that, too, at law as well as in equity. So far from its being at all dependent upon the charge, the charge is so dependent upon the debt that it cannot exist without it. Nor does a sale of the land have any other effect upon the debt than to produce a fund which is applicable to its payment and discharge. In short, the land has nothing to do with bringing the debt into existence, nor with the debt during the period of its existence, — only with its payment and extinguishment. It is true that the debt is personal property, but that is not because it is land converted in equity into money, for it is, from its nature, personal property at law and in fact, as well as in equity. Nor can it owe its existence to the actual sale of the land, for then it would not come into existence till after the sale, whereas it is assumed that the purpose of the sale is the payment of the debt, and hence that the debt exists before the sale is made. As, therefore, a debt charged on land is personal property without reference to the question whether the land is, to the extent of the debt or debts charged upon it, converted in equity into money or not, it follows that the latter question is not a practical one, as no person can have any interest in maintaining either the affirmative or negative of it.

The only practical question, therefore, is whether land which is charged with debts is thereby wholly converted in equity into money, for, if it is, of course any surplus over and above the charge will be converted into money in equity. As to this latter question, however, it may be observed, first, that, before the affirmative of it can be established, it must be proved that a charge of land with debts converts the land into money in equity to the extent of the debts charged upon it, and therefore the arguments which I have urged in disproof of the latter proposition are equally strong in disproof of the proposition that a charge of land

with debts converts the surplus of the land into money in equity; secondly, that, in order to establish the affirmative of this latter proposition, it must be proved that a person can, by a covenant or a direction to sell land, convert such land into money in equity as to himself, and as to those claiming under him, subsequent to such covenant or direction, — a proposition which can easily be proved by authority, but the negative of which is very clear upon principle; thirdly, that, a charge of land with debts, or a direction to sell land for the payment of debts, authorizes a sale of so much of the land only as is necessary for the payment of the debts charged, and, therefore, can not cause an equitable conversion of the surplus of the land over and above such debts. If, therefore, the charge be made by deed, any surplus of the land over and above the charge will still belong, at least in equity, to the person who made the charge, and such surplus will be land in his hands. If the charge be made by will, any surplus over and above the charge will, at least in equity, pass to the testator's heir or devisee, and will be land in his hands. Accordingly, in the case of *Roper v. Radcliffe*,¹ it was resolved by the House of Lords, reversing the decree of the Court of Chancery,

“that though lands devised for payment of debts and legacies are to be deemed as money so far as there are debts and specific legacies to be paid, yet still the heir at law has an interest in such lands by a resulting trust, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the devisee to convey the residue to him; which residue shall not be deemed as money, neither shall it go to the executors of the testator. Nay, the heir at law in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only a trustee for the testator to pay his debts and legacies. This is a privilege which has been always allowed in equity to a residuary devisee; for if he come into court, and tender what will be sufficient to discharge all the debts and legacies, or pray that so much of the lands and no more, may be sold, than what will raise money to discharge them, this is always decreed in his favor. Therefore, though lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect to the creditors and legatees, yet it is not so in respect to the heir at law or residuary devisee; for in those cases they shall be deemed in equity as lands.”

¹ 9 Mod. 167, 170.

So in *Nicholls v. Crisp*,¹ where a testator directed *all* his land to be sold, and charged the proceeds with certain legacies, and, if the proceeds should exceed £3,000 he bequeathed the surplus to his natural daughter, who died before him, Lord Bathurst declared that, the object being to convert the land merely for the purpose of paying the legacies, if the heir would pay the legacies, the lands should not be sold. Also in *Digby v. Legard*,² where a testator devised his real and personal estate to trustees in trust to sell to pay debts and legacies, and to pay the surplus to five persons equally, one of whom died before the testator, and the question was whether her one-fifth was real or personal estate, the counsel for the heir insisted that the testator charged and subjected her land to the payment of her debts and legacies, only in case the personal estate were not sufficient, in which event alone was the land to be sold, and only so much as should be necessary; and that the five residuary legatees might have paid the debts and legacies, and then have called for a conveyance of the land; and Lord Bathurst so held.

While, however, the foregoing cases have never been overruled or even questioned, it must be confessed that the courts have, for the most part, failed to distinguish charges on land from gifts of the proceeds of the sale of land, and hence they have assumed that the former have the same effect as the latter in converting the land into money in equity. Cases arising upon wills, in which they have so assumed, have already been sufficiently stated.³ Cases in which a lien or charge on land is created by deed are generally cases in which debtors, in embarrassed circumstances, make an assignment of their property, both real and personal, for the benefit of their creditors. Such assignments, if they create any new right in favor of the creditors, create in their favor a lien or charge on the property assigned. They do not, however, necessarily create any new right⁴ in favor of the creditors, and when they do not, the assignees, though they become the legal owners of the property, hold it simply as the agents of their assignors, whose servants they are, and who may, therefore, revoke their authority

¹ Stated by Sir R. P. Arden, M. R., in *Croft v. Slee*, 4 Ves. 60, 65.

² Dick. 500.

³ See 19 HARV. L. REV. 26-28; also 17, n. (2). The cases are *Hill v. Cock*, 1 Ves. & B. 173; *Maugham v. Mason*, 1 Ves. & B. 410; *Jessopp v. Watson*, 1 Myl. & K. 665; *Flint v. Warren*, 14 Sim. 554, 16 Sim. 124; *Shallcross v. Wright*, 12 Beav. 505, and *Hamilton v. Foote*, Ir. R. 6 Eq. 572.

⁴ See *Biggs v. Andrews*, *infra*, and *Griffith v. Ricketts*, *infra*.

and require a reassignment of the property at any moment. So far, however, as regards the question of equitable conversion, the courts have generally failed to recognize even this latter distinction. On the contrary, as an assignment for the benefit of creditors generally contains, in terms, a direction to the assignees to sell the property assigned, the courts have generally assumed that this direction alone was sufficient to convert any land included in the assignment into money in equity. Thus, in *Biggs v. Andrews*,¹ where one Biggs conveyed and assigned all his property to two trustees in trust to sell the same, and pay his debts out of the proceeds, and hold the surplus in trust for himself, and he died before his land was all sold, it was held that all his property devolved, at his death, on his personal representatives; but, though there is reason to believe that the decision was in accordance with the wishes of the deceased, yet it seems to be very clear that it was wrong in principle; for it appears that Biggs made the conveyance and assignment, not because he was insolvent, or supposed himself to be so, but because he was out of health, and wished to retire at once from business; and accordingly he had selected the two trustees to wind up his business for him. It is clear, therefore, that, in making the conveyance and assignment he made himself the sole *cestui que trust*, no new right whatever being conferred upon his creditors; that the trustees were simply his agents, though clothed with the naked legal ownership of all the property, and, therefore, he could have revoked their authority at any moment, and required them to reconvey and reassign the property to him. They could also have given up the agency at their pleasure, and, therefore, could not have been compelled to sell any of the land.

So also in *Griffith v. Ricketts*,² where an equity of redemption was conveyed to trustees in trust to sell the same for the payment of the grantor's debts, any surplus to be paid to the grantor, "his executors, administrators, and assigns," it was held that, upon the grantor's death, the equity of redemption devolved in equity upon his personal representative, subject, of course, to any charge which the conveyance had created. The judgment, however, seems to rest chiefly, if not wholly, upon the words which I have placed within quotation marks. To me, however, it seems clear that those words have no bearing upon the question. The only thing that could cause an equitable conversion of the land into money

¹ 5 Sim. 424.

² 7 Hare 299.

was the direction to the trustees to sell the land; and the words quoted could not even aid in creating an equitable conversion, unless they constituted a gift of any surplus which should be produced by the sale; and it cannot be seriously claimed that they did constitute such a gift. Wigram, V. C., says¹: "The first question is how the case would be if the trustees had sold the land in the lifetime of the grantor, and had the money in their hands. In that case it would, I apprehend, clearly belong to the personal representative of the grantor." Undoubtedly it would, but the plain reason seems to me to be that it would be a part of the grantor's personal estate at the time of his death, and hence would devolve like his other personal estate.²

Finally, in *Clarke v. Franklin*,³ where land was granted and conveyed to trustees, subject to a life estate in the grantor, in trust to convert the same into money at the grantor's death, and pay out of the net proceeds six sums of £50 each and one sum of £20, to persons named, or such of them as might be living at the grantor's death, and no valid disposition was made of the residue of the net proceeds, it was held that the land was converted into money in equity from the moment of the delivery of the deed of conveyance, and hence that it devolved in equity, at the grantor's death, as if it were money. It will be seen, however, that the deed in this case is of a very different nature from that in either of the two preceding cases; for, instead of being an assignment for the benefit of creditors, it seems to have been a substitute for a will. Accordingly, the grant which it made was not to take effect in possession until the grantor's death. So also the several sums of money which were charged on the land appear to have been gifts, and would, therefore, have taken the form of pecuniary legacies, if the document had been a will. On the other hand, the deed took effect immediately on its delivery, and, unlike a will, was irrevocable.

There is also another, but wholly different class of cases, in which money is directed to be laid out in the purchase of land, and yet the ownership of the land, when purchased, will be just where the ownership of the money was when the purchase was made, namely, where land is settled, the legal ownership being vested in trustees,⁴

¹ Page 313.

² See 18 HARV. L. REV. 4-9.

³ 4 K. & J. 257.

⁴ If the legal ownership is not vested in trustees, but the limitations of the settlement are legal, the same object is accomplished by means of a power.

and the latter are authorized to sell the land, but are directed to invest the proceeds of the sale in other land, and the land is accordingly sold, but, before other land is purchased, the question arises whether the money is, from the moment of the sale, converted in equity into land; and this question has always been answered in the affirmative,¹ and seems never to have been supposed to be open to doubt; and yet it seems to be clear, upon principle, that it ought to have been answered in the negative. Neither the direction to reinvest the money in land, nor the actual reinvestment of it in land, causes any change in ownership of the settled estate, for, though no such direction, or even authority, had been given, yet, when the land was sold, the proceeds of the sale would have followed the limitations of the settlement, they taking the place of the land. The only reason, therefore, for directing the reinvestment of the money in land is that the settlor prefers land as an investment, — not that he wishes the estate to continue to devolve in equity as if it were land, notwithstanding the land is sold, as it will so devolve in any event. It has been seen, moreover, that, when money is converted in equity into land by a direction that it be exchanged for land, what actually takes place is this: the person who gives the direction, at the same time creates a right in another person to have the exchange made, and then to have the land, or some portion thereof, or some estate therein conveyed to him; and the money is said to be converted immediately into land in equity, because, if the person in whom such right is created shall die, intestate, before the actual exchange is made, his right will devolve in equity upon his heir as if it were land. In the case now under discussion, however, there is nothing of this kind. On the contrary, each person who will, under the settlement, have an interest in the land when purchased, has, in the meantime, the same interest in the money, and the land will, when purchased, simply take the place of the money, just as, when the original land was sold, the money took the place of the land. If, therefore, this money will devolve as if it were land in equity, by reason of its having been converted in equity into land, it must be because in equity it *is* land, *i. e.*, because it has, by a fiction, been transmuted by equity. In other words, if the money has been converted in equity into land, the conversion must have been direct,

¹ *Chandler v. Pocock*, 15 Ch. D. 491, 497, 16 Ch. D. 648; *Walrond v. Rosslyn*, 11 Ch. D. 640; *In re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244; *In re Greaves's Settlement Trusts*, 23 Ch. D. 313.

and yet there is no ground upon which equity can make a direct conversion.¹

As, however, money into which settled land has been converted will follow the limitations of the settlement, whether such money be treated as money or as land, the reader may think the question which I have been considering is not of much practical importance. It is always important, however, that a legal question should not only be correctly decided, but that the reasons given for the decision should also be correct, it being impossible to foresee what mischiefs may result from erroneous reasons given for correct decisions. Moreover, if the money into which settled land has been converted be erroneously held to have been reconverted in equity into land, the result is not likely to be the same as if what is money in fact had been treated as money in equity also, unless the equitable conversion of the money into land is confined to the limitations of the settlement; and yet we have had too much occasion to see that, when money is covenanted or directed to be laid out in the purchase of land, and the land to be settled, the courts always hold that the money is converted into land in equity, not merely to the extent of the limitations in the settlement, but also as to the reversionary interest retained by the settlor, *i. e.*, not only as to the persons in whose favor the settlement is to be made,

¹ For the reason stated in the text, as well as for another reason, the case of *Ashby v. Palmer*, 1 Mer. 296, 1 Jar. on Wills, 1st ed., 527, seems to have been erroneously decided, though that was a case of converting land into money, — not money into land. In that case, a testator, who was a widow, and had an infant daughter and only child, devised all her land to trustees in trust to sell the same for the payment of debts, and for educating and bringing up the daughter, and, when the latter attained twenty-one or married, the trustees were directed to pay to her any proceeds of the sale still remaining in their hands. The daughter became a lunatic before she attained full age, and so remained till her death, — more than fifty years after the will was made. None of the land having been sold, Sir W. Grant, M. R., held that the daughter's next of kin were entitled to it. It seems to be clear, however, first, that the land descended in equity to the daughter, and, therefore, that, if it had been sold, the proceeds of the sale would have belonged to her in equity, subject to any use which the trustees were authorized to make of them. Consequently, a sale of the land would have been attended with no alienation of the proceeds of the sale, and so the direction to sell caused no equitable conversion. Secondly, it seems equally clear that the trust was to cease on the daughter's attaining twenty-one or marrying, unless debts should still remain unpaid. Certainly, the trustees were not authorized to sell the land after the daughter attained her full age or married, except for the payment of debts. Assuming, then, that the direction to sell for payment of debts caused no equitable conversion, there ceased to be any equitable conversion when the daughter attained twenty-one, as a direction to sell cannot possibly cause an equitable conversion after it has ceased to confer any authority.

but also as to the settlor and those claiming under him, and to this rule the case now under consideration is no exception. Thus, in *Walrond v. Rosslyn*,¹ where, by marriage settlement, the intended husband settled land in the usual manner, and the settlement contained the usual power of sale and exchange, and, in case of a sale, the proceeds were to be invested in other land, which was to be settled to the same uses to which the land sold was settled, and some of the land had been sold, but the proceeds had not been invested in other land, and all the limitations of the settlement had come to an end, except that in favor of the intended wife by way of jointure, so that the proceeds of the sale had confessedly become the absolute property of the settlor, subject only to said jointure, and the settlor had died intestate, it was held by Sir G. Jessell, M. R., that said proceeds must be treated as land in equity, and consequently that they devolved upon the settlor's heir; and yet such proceeds ought, upon principle, to have been held to devolve upon the settlor's next of kin, and that for three reasons: first, the jointress had the same right in said proceeds that she would have had in land purchased with them, and hence there was no equitable conversion of said proceeds into land; secondly, the jointress had only a charge on the land originally settled, her jointure being by way of a legal rent-charge, and, for that reason also, there was no equitable conversion of said proceeds in her favor; thirdly, in no possible view could said proceeds be converted in equity, except in favor of the jointress, nor even in her favor for any longer period than her life.

So in *Chandler v. Pocock*,² where, by a marriage settlement, the father of the intended wife settled land to the use of himself, the intended husband, and the intended wife, successively for their respective lives, remainder, in the events which happened, to such uses as the intended wife should by will appoint, remainder in default of appointment by her, to the settlor in fee, and the settlement contained a power of sale, the proceeds of the sale to be invested in other land, and the land was sold accordingly for consols, but the consols had not been invested in other land, and the wife by her will bequeathed all the residue of her personal estate and effects whatsoever, and the question was whether this bequest operated as an appointment of the consols under s. 27 of

¹ 11 Ch. D. 640.

² 15 Ch. D. 491, 497, 16 Ch. D. 648.

the Wills Act,¹ it was held, first, by Sir G. Jessell, M. R., and afterward by the Court of Appeal, that it did. Was the decision correct? There seems to be no room to doubt that it carried out the intention of the testator, and, if the consols were personal property in equity, as they were in fact, the question would not even have arisen. Yet both courts proceeded on the assumption that the consols had been wholly converted in equity into land, and, on that assumption, the decision involved the somewhat startling doctrine that the term "personal property," in s. 27 of the Wills Act, meant "actual personal estate, though constructively converted into land," *i. e.*, that the Legislature, in enacting that section, wholly ignored the doctrine of equitable conversion.

In *In re Greaves's Settlement Trusts*,² by marriage settlement, the intended husband settled land on the intended wife for her life, retaining the reversion in fee in himself. The settlement contained a power to sell the land, the proceeds to be invested in other land; and the land was accordingly sold, but the proceeds were invested in new three per cents, and so remained; the wife survived the husband, who bequeathed all his money in the public funds or elsewhere to his children equally, and Frye, Justice, held that the new three per cents did not pass, the same being converted in equity into land, and the bequest not operating as an appointment under s. 27 of the Wills Act. The consequence, therefore, of holding that the new three per cents were converted in equity into land, was that the testator's intention as to their disposition was wholly frustrated; though this was only because the conversion was held to extend to the husband's reversionary interest. If it had been held either that there had been no equitable conversion, or that the equitable conversion extended only to the wife's life interest, the testator's intention would have been fully carried out.

Lastly, in *In re the Duke of Cleveland's Settled Estates*,³ where settled land was vested in the Duke of Cleveland as tenant for life in possession, remainder to his first and other sons successively in tail male, remainder to said Duke in fee, and the same was sold under a power conferred by a private Act, which directed the proceeds of the sale to be invested in other land, but they were invested in consols instead, and the Duke afterwards died without issue, having devised his residuary real and personal estate to

¹ 7 Wm. IV. & 1 Vict. c. 26.

² 23 Ch. D. 313.

³ [1893] 3 Ch. 244.

trustees in trust for the Hay family, the Court of Appeal held that said consols passed under said residuary clause, but that they passed as land; and yet the Duke's remainder in fee, which was all that passed by his will, was entirely outside the settlement, and so the decision is open to the same objection as the decision in the preceding case.

C. C. Langdell.

CAMBRIDGE, October, 1905.

THE LIABILITY OF CORPORATIONS ON CONTRACTS MADE BY PROMOTERS.

THE law is settled to the effect that an agreement entered into between a third person and a promoter, prior to the existence of the corporation, is not binding upon it, although made on account of the corporation and with the expectation that it will be liable. It is immaterial whether the agreement in question is in the name of the prospective corporation or that of the promoter. It is an equally unquestioned rule that, under certain circumstances, the corporation may become liable on terms substantially the same as those embodied in the agreement antedating the corporate existence. The purpose of this article is to consider the legal principles on which this liability rests.

For the sake of clearness, it is advisable to refer at the outset to a certain class of cases in which corporate liability exists. Though the principles involved are not properly within the scope of the present discussion, the tendency to confuse the basis of liability in those cases with cases covered here makes it necessary to point out briefly the theory on which those decisions proceed.

In many jurisdictions statutes make the corporation liable for certain expenses attending the organization and promotion of the company; more commonly the charter or the deed of settlement makes similar provisions.¹ Where such is the case, persons performing the services provided for in reliance upon the provisions may recover against the corporation when formed, the remedy being statutory.²

When the promoter has made a contract with a third person, the corporation may become a party to it by novation. It is obvious that the doctrine involved here is not peculiar to promoters, but extends to all contracts dealing with subject-matter within the scope of corporate power. Neither is it material at what time the contract was entered into with reference to the corporate existence.

¹ Lindley, Companies, 6th ed., 196.

² Scott v. Lord Ebury, L. R. 2 C. P. 254; Lindley, Companies *supra*.

The corporation may also obtain rights under a contract by means of an assignment from the promoter or other parties.¹ Here, again, it is of no consequence whether the contract is with a promoter or not, and the time when it is made is equally immaterial.

A class of cases also exists in which the corporation is liable on the theory that a trust fund has been created by the corporation for the benefit of third persons, as a result of an agreement between the promoter and the corporation. In *Touche v. Metropolitan Ry. Warehousing Co.*,² the plaintiff was allowed to recover in equity on the theory that the corporation had made the promoter trustee of the sum in question. The decision has been doubted, as to the propriety of the finding that a trust relation existed under the facts in evidence,³ although the principle is admitted that a trust may be created in favor of a third person by virtue of an agreement between the corporation and the promoter. In those jurisdictions where the real party in interest is permitted to sue, the third party may frequently have a remedy against the corporation, as a result of a provision for payment contained in a valid contract between the promoter and the corporation.

These exceptional cases being disposed of, it is now possible to take up the cases, which are the immediate object of this discussion, where an agreement has been entered into between a promoter and a third person, on which it is now proposed to hold the corporation liable. The common form of statement is that a corporation, by ratification or adoption, becomes liable on contracts made by a promoter on its account, prior to organization.⁴ This statement, as far as it involves any theory of ratification, is clearly incorrect if taken literally, and repugnant alike to principle and to the great weight of authority.⁵ Ratification is possible only where a contract is made by a person purporting to act for an existing principal, who is capable of making the contract himself at the time it is entered into. Clearly the doctrine can have no application in the class of cases discussed here, since the alleged principal is non-existent when the contract is made. Furthermore, the

¹ *Werdeman v. Soc. Gen'l D. Elec.*, 19 Ch. D. 250.

² *L. P. C. A. Cas.* 671.

³ *Gandy v. Gandy*, 30 Ch. D. 57; *In re Empress Engineering Co.*, 16 Ch. D. 125.

⁴ *Stanton v. New York, etc., Ry. Co.*, 59 Conn. 272; *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368.

⁵ *In re Empress Engineering Co.*, 16 Ch. D. 125.

promoter is not an agent in any proper sense of that term. His activities are confined to the promotion and organization of the corporation, and cease when the organization is complete. It is evident that the principles of agency will not serve in the solution of the question. The meaning of the term *adoption*, usually coupled with ratification as an alternative, by means of which the corporation may become liable, is somewhat obscure as used by the courts in this connection. It has been defined "to take or receive as one's own that with reference to which there existed no prior relation, colorable or otherwise."¹ With many courts the meaning is apparently the same as ratification. Properly it can be regarded only as a synonym of acceptance.²

The point of departure in the discussion, as far as the English cases are concerned, is a group of cases decided by Lord Cottingham.³ Of these, *Edwards v. Grand Junction Ry. Co.* is the most frequently cited, on account of the full discussion by the court. The importance of the case justifies a somewhat complete statement.

The bill prayed an injunction restraining the defendant company from proceeding in violation of an agreement made by the projectors of the defendant company with the plaintiffs, by the terms of which the plaintiffs were to withdraw all opposition to the granting of a charter to the proposed company, in return for which the projectors promised to have inserted in the company's articles certain amendments respecting the width of a bridge over the turnpike operated by the plaintiffs. The corporation when formed proceeded to build the road, ignoring entirely the agreement with the projectors. The agreement in question was never acted upon by the corporation. Lord Cottingham, in granting the injunction, stated that the corporation stands in the place of the projectors and succeeds to their rights and must assume their liabilities. In reply to the argument that no undertaking by the corporation is shown, the court said: "The question is not whether there can be a binding contract at law, but whether the court will permit the company to use its powers under the act in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain powers."

¹ *Schreyer v. Turner Flouring Co.*, 29 Ore. 1.

² *Lindley, Companies*, 6th ed., 232.

³ *Edwards v. Grand Junction Ry. Co.*, 1 Myl. & Cr. 650; *Stanley v. Chester & B. Ry. Co.*, 9 Sim. 264; *Webb v. L. & P. Ry. Co.*, 9 Hare 129.

The decision, which was followed in two later decisions¹ by the same judge, goes much further than any other case, both in its facts and conclusion, since the company had not in any way indicated an assent to the agreement of the projectors, making it impossible to invoke any doctrine of ratification or adoption.

The acceptance of the charter cannot be regarded as such an assent, since the company derives its charter from Parliament and not from the plaintiff, hence its enjoyment cannot be regarded as inconsistent with the defendant's claim of non-liability on the agreement.²

The decision has been repeatedly criticised in the later English decisions, and while not in terms overruled, it is seriously discredited as a precedent.³ The decision is criticised for assuming any identity between the projectors and the corporation itself. If the identity exists, then the conclusion that the company is liable follows without question, as it would be against conscience for a group of men, acting under the cloak of a legal fiction, to ignore obligations undertaken by them in another capacity. There may be such an identity in a particular case, but as the probability is against it, the court is not justified in assuming such identity without proof. The primary purpose of the promoter is to interest investors in the proposed corporate enterprise. Almost invariably when the corporation is organized, persons not concerned in the projection are allottees of shares. Frequently the projector is not a member of the corporation at all. The injustice of the decision lies in subjecting innocent subscribers to obligations which they did not contemplate and which they cannot ascertain by reasonable diligence.⁴

If the theory advanced as to identity by Lord Cottingham be denied, it is difficult to find any ground for relief in equity, unless a contract be made out between the third person and the corporation, and such is apparently the view taken by the later decisions.⁵

¹ *Supra*, p. 99, note 3.

² *In re Skegness & St. Leonards Tramways Co.*, 41 Ch. D. 215.

³ Fry, *Specific Performance of Contracts*, 4th ed., 103; *Caledonian & Dumbartonshire Ry. Co. v. Magistrates of Helensburg*, 2 Macq. H. L. Cas. 391; *Preston v. L. M. Ry. Co.*, 5 H. L. Cas. 605; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Melhado et al. v. Porto Alegre, N. H. & B. Ry. Co.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125.

⁴ *C. & D. Ry. Co. v. Magistrates of Helensburg*, *supra*; *Preston v. L. M. Ry. Co.*, *supra*; *Earl of Shrewsbury v. N. Staffordshire Ry. Co.*, L. R. 1 Eq. 593.

⁵ *Gooday v. Colchester, etc., Ry. Co.*, 17 Beav. 132; *Caledonian & D. Ry. Co.*

The same conclusions are reached in cases¹ where the third person is attempting to prove in the winding-up proceedings of the corporation. In these cases the corporation had after organization passed resolutions or taken other steps for the purpose of adopting or ratifying the contract made on its account,—a circumstance not present in the cases decided by Lord Cottingham,—yet the right to prove was denied.

In the case of *In re Northumberland Hotel Co.*,¹ the directors of the company not only adopted the contract made by the promoter on its account, but took possession of leasehold premises obtained under the contract, compromised a suit for specific performance brought by the lessor, and paid rent to him, yet the lessor was not allowed to prove on the contract in the winding up proceedings, on the ground that no contract was shown to subsist between the lessor and the corporation. It is admitted by the court that if the lessor could have shown a new contract entered into between the corporation and himself, proof would have been allowed, but evidence that the directors passed resolutions adopting the agreement and took possession of property under it will not establish such a contract, since all those steps were obviously taken by the company under the assumption that the old contract was valid, and cannot be taken as showing a new contract.

In *Scott v. Lord Ebury*,² where the action was to recover from the promoters for money advanced by the plaintiffs to meet the parliamentary expenses incurred in securing the charter of the company, Willes, J., in reply to the contention that the debiting of the company by the plaintiff on its books, coupled with a resolution of the board of directors of the company confirming the agreement made by the promoters, showed a new contract which would discharge the promoter, observed that one element was lacking to make such a conclusion possible, namely, the assent of the bank. The acts urged as showing a new contract were taken in the mistaken belief of liability under the original contract, and there is no evidence of any meeting or agreement between the bank and the corporation.

Precisely what evidence will justify the conclusion that a new

v. Magistrates of Helensburg, 2 Macq. H. L. Cas. 391; *Preston v. L. M. Ry. Co.*, 5 H. L. Cas. 605.

¹ *In re Empress Engineering Co.*, 16 Ch. D. 125; *In re Northumberland Hotel Co.*, 33 Ch. D. 16; *Kelner v. Baxter*, L. R. 2 C. P. 174 (*semble*); *Bogat Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, 71 L. J. Ch. 158 (*semble*).

² L. R. 2 C. P. 254.

contract has been made is indicated in the case of *Howard v. Patent Ivory Co.*,¹ where one Jordan entered into an agreement with one Wyber, acting on behalf of the defendant company about to be formed, to sell certain property to the corporation. The corporation was organized, both the articles and memorandum providing for the adoption of the agreement in question. At a meeting of the directors, at which Jordan was present, resolutions were passed adopting the agreement and accepting the offer of Jordan to take part of the purchase price in debentures, and under the resolution the company's seal was affixed to the documents transferring a leasehold to the company and the debentures to Jordan. The company entered into possession of the leasehold premises and transacted business thereon. Subsequently the company was wound up, and the liquidator took an assignment of the rest of the property to be transferred under the agreement by Jordan to the company.

The court found on these facts that a new contract was entered into. The conclusion of the court in *In re Northumberland Hotel Co.*² was criticised but distinguished from the case at bar, on the ground that Jordan was present at the directors' meetings and participated in a modification of the original contract, in effect making a new contract.

It is questionable whether *Edwards v. Grand Junction Ry. Co.*³ would be followed by the English courts⁴ even if the precise question were involved. It certainly has been thoroughly discredited on principle, and the view now taken is that the corporation is not liable on contracts antedating its formation, although made on its account, but that the corporation may become liable on a new contract made directly between the corporation and the other party. In determining whether or not such contract exists, steps taken by either party in the belief that the original agreement made through the promoter still exists will not be considered. The proposition just stated, of course, excludes the exceptions previously referred to, where the liability rests on some principle of trust, novation, assignment, or express provisions of statute or charter.

The American cases, both at law and in equity, are overwhelmingly in favor of holding the corporation liable on contract antedating its existence, wherever it has "ratified or adopted" the

¹ 38 Ch. D. 156.

² *Supra.*

³ *Supra.*

⁴ Fry, *Specific Performance of Contracts* 107.

same, ratification or adoption being shown either by express resolution of the managing body or by accepting the benefits or fruits of the contract.¹

The American cases without exception are subsequent in time to the group of cases decided by Lord Cottingham² which are cited with approval as decisive of the questions decided by the American courts, and apparently form the basis of the generally accepted American doctrine. No case has been found, however, that goes as far as the English cases referred to, the American courts insisting in every instance on some act by the corporation subsequent to organization showing an intent to be bound.

The American courts, owing, perhaps, to the obliteration of distinctions between law and equity in matters of procedure, have failed to note the limitations which the circumstances of the English cases impose upon them as general legal propositions. The principles underlying the liability imposed are as a rule very meagerly discussed; the liability is assumed rather than justified. The criticisms of Lord Cottingham's view by the later English cases are not noticed by the American courts, although in a few instances the arguments urged against their soundness are dealt with.³

A number of cases come within the exceptional classes noted in discussing the English decisions where the liability properly rests on a novation or assignment.⁴

¹ Little Rock & Ft. Smith Ry. Co. *v.* Perry, 37 Ark. 164; M. & H. Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206 (*seemle*); Arapahoe Investment Co. *v.* Platt, 5 Colo. App. 515; Carter *v.* San Francisco Sugar Ref. Co., 19 Cal. 220; Stanton *v.* N. Y., etc., Ry. Co., 59 Conn. 272; The Georgia Co. *v.* Castlebury, 43 Ga. 187 (*seemle*); Smith *v.* Parker, 148 Ind. 127; Dubuque Female College *v.* Township of Dubuque, 13 Iowa 555; Bank of Forest *v.* Argill Bros. & Co., 34 So. Rep. 325 (Miss.); Esper *v.* Muller, 91 N. W. Rep. 613 (Mich.) (*seemle*); Grape Sugar & Vinegar Mfg. Co. *v.* Small, 40 Md. 395; Oaks *v.* C. W. Co., 143 N. Y. 430; Law *v.* Railway Co., 45 N. H. 370; Schreyer *v.* Turner Flouring Co., 29 Ore. 1; Bell Gap Ry. Co. *v.* Christy, 79 Pa. St. 54; Ireland *v.* Globe Milling Co., 20 R. I. 190 (*seemle*); Huron Printing & Binding Co. *v.* Kittleson, 4 So. Dak. 520; Chase *v.* Redfield Creamery Co., 12 So. Dak. 529; Kaeppler *v.* Redfield Creamery Co., 81 N. W. Rep. 907 (So. Dak.); Pittsburg, etc., Mining Co. *v.* Quentrell, 91 Tenn. 693; McDonough *v.* Bank of Houston, 34 Tex. 309; Buffington *v.* Bordon *et al.*, 80 Wis. 635; Whitney *v.* Wyman, 101 U. S. 392 (*seemle*).

² Edwards *v.* Grand Junction Ry. Co., Stanley *v.* Chester & B. Ry. Co., Webb *v.* L. & P. Ry. Co., *supra*.

³ N. Y., etc., Ry. Co. *v.* Ketchum, 27 Conn. 170; Safety Deposit Life Ins. Co. *v.* Smith, 65 Ill. 309; Park *v.* Modern Woodmen of America, 181 Ill. 214; Oldham *v.* Mount Sterling Imp. Co., 103 Ky. 529.

⁴ Colo. L. & W. Co. *v.* Adams, 5 Colo. App. 190; Stanton *v.* N. Y., etc., Ry. Co., 59 Conn. 272 (*seemle*); Oldham *v.* Mount Sterling Imp. Co., 103 Ky. 529; Esper *v.* Miller, 91 N. W. 613 (Mich.) (*seemle*); Snow *v.* Thompson Oil Co., 59 Pa. St. 209 (*seemle*).

The view that a corporation may be estopped to deny that it is bound by the contract made by the promoter is advanced by a well known writer on corporations,¹ and is accepted as the basis of decision by a few courts.² The application of the principle is not clear, since the action of the corporation in approving the contract made on its account and in taking possession under it is attributable ordinarily to the belief shared by both parties that the original contract is binding upon them. How, then, is it possible to estop the corporation by conduct obviously due to a mutual mistake as to the legal liabilities of the parties?

In a number of jurisdictions the agreement between the promoter and third person is regarded as an open offer to the corporation, which it may accept when organized, and thus create a new contract between the third person and the corporation.³ A resolution adopting or ratifying the original agreement, or the acceptance of the fruits of the contract is generally regarded as sufficient proof of acceptance.

It is evident that practically all of the cases decided on the ground of ratification or adoption could rest on the grounds stated in the cases just referred to, since in every instance the corporation has assented to the agreement made on its account, either in terms or by implication.

Both the English and American decisions recognize the possibility of a new contract between the corporation when organized and the third person, the broad line of distinction between the cases being the manner in which such contract can be made out; the English courts taking the position that acts of the corporation which are clearly attributable to the erroneous belief on its part that it is liable on the original contract cannot be received as evidence of a new contract, particularly when coupled with the further fact that direct negotiations between the third party and the corporation cannot be shown. The American courts, on the other hand, receive as evidence of a new contract all acts indicating an intent by the corporation to receive the benefits of the original contract.

¹ Thompson, 1 Commentaries on Corporations, § 480.

² *Blood v. La Serena Land & Water Co.*, 121 Cal. 221; *Grape Sugar & Vinegar Mfg. Co. v. Small*, 40 Md. 390 (*semble*).

³ *Smith v. Parker*, 148 Ind. 127; *Penn. M. Co. v. Hapgood*, 141 Mass. 145 (*semble*); *Holyoke Envelope Co. v. U. S. Envelope Co.*, 182 Mass. 171 (*semble*); *Waetherford, etc., Ry. Co. v. Granger*, 86 Tex. 350; *E. & C. Oil Co. v. Burks*, 39 S. W. Rep. 966 (Tex.); *Wall v. Niagara Mining & Smelting Co.*, 20 Utah 474; *Pratt v. Oshkosh Match Co.*, 89 Wis. 406.

The Supreme Court of Massachusetts approaches most nearly the present English view,¹ when it declares that a corporation cannot become liable on its promoters' contract by ratification or adoption. In a later decision,² the court, by way of *dictum*, intimates that the acceptance of benefits may be evidence of a new contract between the third party and the corporation.

The American decisions, while practically unanimous in the result reached, are far from satisfactory as to the legal principles underlying the liability. The English cases, on the other hand, have developed a logical, consistent theory of liability. The consequences of the liberal American view on the question of proof are not unjust: the corporation is protected against improvident agreements made on its account by promoters, since it has the power of acceptance or refusal. It is submitted that an equally just result is possible without doing violence to recognized principles of agency and contract.

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¹ *Abbott et al. v. Hapgood et al.*, 150 Mass. 248.

² *Holyoke Envelope Co. v. U. S. Envelope Co.*, 182 Mass. 171.

DEBTOR'S INTERFERENCE IN THE ELECTION OF A TRUSTEE IN BANKRUPTCY.

GENERALLY in the Continental systems of bankruptcy legislation it is the policy of the law for the court to appoint its own official administrator to handle the bankrupt's estate. The creditors may be consulted, or even have some advisory or supervisory control over the official court administration, but the actual executive control of the assets is in the hands of the court official.¹

In the English bankruptcy system it is a cardinal principle that the creditors are to have the full control of the administration of the bankrupt's estate. The court is merely the supervisory power. The last English Bankruptcy Act of 1883² gives the creditors an absolute right to name the trustee who shall administer the estate in their behalf. The Board of Trade may for cause object to the selection of the creditors, and the High Court will pass on the validity of the objections, which may be for any of three causes: first, that the appointment was not made in good faith; second, that the appointee is not a fit person. The only persons absolutely disqualified are the official receivers, or a person who has previously been removed from the office of trustee for misconduct or neglect. Third, that the relations of the appointee are such that it would be difficult for him to act impartially.

In this country the policy of bankruptcy legislation on this subject has not been uniform. Beginning with our first Bankruptcy Law in 1800, Congress gave to the creditors the fullest liberty in the choice of the trustee. The Act of 1800 provided that the major part in value of the creditors should choose a person or persons to whom the bankrupt's estate and effects should be transferred.³ No approval of the choice on the part of the court was provided for.

In the Bankruptcy Act of 1841, however, the Continental practice was adopted. The title to the bankrupt's estate was vested in an assignee appointed by the court.⁴

¹ Dunacomb, *Bankruptcy*, Columbia College Studies in History, etc., No. 2, p. 2.

² 46 & 47 Vict. c. 53.

³ Bankruptcy Act of 1800, § 6.

⁴ Bankruptcy Act of 1841, § 3.

Evidently the system of official court assignees was found unsuited to American conditions, for in 1867 the Bankruptcy Act passed in that year followed more nearly the English practice. It left the creditors to choose one or more assignees of the estate of the debtor subject to the approval of the district judge.¹ The general orders of the Supreme Court expressly prohibited the appointment by the district judges of any official assignees or any general assignees to act in any class of cases.²

The Bankruptcy Act of 1898 was closely modeled after the Act of 1867 regarding the selection of the trustee in bankruptcy, although its provisions are not wholly consistent. The bankruptcy court is invested with power to appoint trustees pursuant to the recommendation of creditors.³ On the other hand, the creditors themselves are given the absolute right to appoint one or three trustees.⁴

This conflict in the statute has led to a curious result. Not only has the Supreme Court copied the old General Orders under the Act of 1867 that no official trustees shall be appointed,⁵ but has engrafted a limitation on the free right of selection of the trustee on the part of the creditors that the appointment "shall be subject to be approved or disapproved by the referee or by the judge."⁶ There is clearly no warrant for this usurpation on the part of the court. The General Order plainly seeks to borrow from the Act of 1867 one of its provisions that Congress has not seen fit to re-enact in the present statute. Although there has been no judicial disapproval of this order, one of the leading text-book writers on bankruptcy has already expressed doubts of its validity, and the expectation that this general order will not stand the scrutiny of the court that promulgated it.⁷

The seven years of practice under the present statute has furnished an unbroken precedent of the selection of the trustee by the creditors. The court never undertakes to exercise its right of appointment under its general power, and names a trustee under the express authority given it under section 44 only when the creditors fail or neglect to exercise their rights. The selection of

¹ Bankruptcy Act of 1867, § 13.

² General Orders, IX, Supreme Court, October term, 1874.

³ Bankruptcy Act of 1898, § 2 (17).

⁴ Bankruptcy Act of 1898, § 44.

⁵ General Orders, XIV, 172 U. S. 657.

⁶ General Orders, XIII, 172 U. S. 657.

⁷ Collier, Bankruptcy, 4th ed., 330.

a trustee is an important and substantial right of the creditors. It is a matter of first importance in every case. Much of the success of the present Bankruptcy Act depends on an intelligent safeguarding of this privilege to the creditors on the part of the courts.

Under our present statute one of the most important questions relating to the election of a trustee has arisen in a class of cases where the bankrupt seeks to influence or control the selection of the person who is to be trustee. The bankrupt may have much to gain from the appointment of a favorable trustee. Often his creditors are widely scattered and unknown to each other, their respective claims may be small, and important only in the aggregate. Negligent, complaisant, and friendly creditors will be only too ready to follow a request or suggestion of a debtor who may have traded with them for years or who may hold out hopes of future advantages. For a time at least the names and addresses of the creditors are in the exclusive control of the bankrupt. It is very easy to see how the debtor who desires to stifle an investigation, or to regain speedy control of his estate can turn all this to his advantage. It is an easy matter for the bankrupt to solicit the claims or proxies of his various creditors and elect his nominee to the office of trustee over the efforts of an unorganized and widely scattered body of creditors. It is, of course, obvious that such action is a gross fraud on the creditors, and that any court to whose attention this state of affairs is brought should make every effort to defeat such a scheme.

The first time such a question was brought to the attention of a court was in 1821 in the English case of *Ex parte Shaw*.¹ After a contested election a petition was presented in behalf of the defeated candidates to the Lord Chancellor, praying that the assignment of the estate to the persons who had received the majority of votes might be stayed and that the same be executed to them. One of the grounds of this request was that the election had been procured by the canvas and solicitation of the bankrupts. The Vice-Chancellor, Sir John Leach, was of the opinion that the choice should be avoided. "It is against the first principles and the whole policy of the bankrupt laws to permit bankrupts indirectly to choose their own assignees." When this question was presented to Lord Eldon on appeal, he dodged a decision by finding the choice invalid on other grounds. This case, however, has always

¹ 1 G. & J. 125.

been cited as sustaining the view of the Vice-Chancellor, and it became a fixed principle of the English bankruptcy practice that such interference by the bankrupt avoided the election,¹ until finally the subject seems to be satisfactorily covered by express provision of their bankruptcy statute.

Unfortunately the courts in this country who have considered this subject have not agreed upon either the theory or method of dealing with the problem. All our courts recognize that the whole policy of the Bankruptcy Law is to give to creditors the free, deliberate, and unbiased choice in the first instance of the person who is to administer the assets of the bankrupt estate. The present statute is very carefully drawn to check undue control of the bankrupt's affairs, either by a few interests, or by the bankrupt's influence in connection with them to the prejudice of the general body of creditors.² To elect a trustee a majority vote both in number and value of the creditors present and voting is necessary.³ This insures that neither one large predominating creditor may choose a trustee in his interests, nor that several insignificant creditors in combination may elect a trustee to the prejudice of what may be the only substantial interests in the proceedings.

On the other hand, it is equally certain that an honest bankrupt can have no real interest in the choice of the trustee. The creditors alone are the beneficiaries in the administration of the estate.

"The trustee's duties are administrative, not judicial. It is not his special duty 'to hold an even hand or an unbiased mind' towards the bankrupt, but to make the most possible out of the assets, and in the performance of this duty mere bias or unfriendliness toward the bankrupt must be rarely, if ever, material. Considering the number and frequency of fraudulent bankruptcies in the past, a zealous watch and scrutiny of an insolvent's transaction cannot be looked upon as demerit, or as indicative of a lack of 'competency' in a trustee. And unfounded suspicions and prejudice even may be met by the honest merchant without fear."⁴

Where there is evidence sufficient to establish that the bankrupt or his representatives have interfered with the election of a trustee, two possible courses seem to be open to the minority creditors. They may challenge the vote, or may demand that the referee

¹ *Ex parte Molineaux*, 3 M. & Ay. R. 703; *Ex parte Carter*, 3 De G. & J. 116.

² *In re Henschel*, 109 Fed. Rep. 861, 6 Am. B. Rep. 305.

³ Bankruptcy Act of 1898, § 56 a.

⁴ *In re Lewensohn*, 98 Fed. Rep. 576, 3 Am. B. Rep. 299. See also *In re Clairmont*, 1 N. B. Rep. 276.

disapprove the election. Some of the cases have held that the mere fact that the vote is influenced or controlled by the bankrupt in his own interests is no ground for objecting to it. The only mode of raising such an objection is by opposing the approval of the election.¹ Other cases have allowed the challenge of the votes so cast,² while one of the more recent cases held that the referee may either decline to receive the votes, or to approve the election.³

The present Bankruptcy Law has very carefully defined the qualifications of the trustee:

"Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."⁴

When the bankrupt is attempting to control the election of the trustee, he is usually sufficiently clever to select as his candidate some individual of personally irreproachable character who is perfectly competent to fill the position.⁵ Conceding the validity of the General Orders, rule XIII, how can the referee withhold his approval to such a candidate if he is the selection of the unchallenged vote of the majority in value and number of the creditors? The discretion to approve or disapprove which he may exercise is not an arbitrary power. It must rest on the basis of some provisions of the statute.⁶

"The referee should not disapprove of the choice of a trustee by creditors, nor should he interfere with, or influence such choice except upon clear proof of incompetency for performance of duty or non-residence."⁷ Even under the Act of 1867, in which, with one exception,⁸ there was no specific disqualification for a trustee, and a general discretion to approve or disapprove of the election

¹ *Re Noble*, Fed. Cas. 10282, 3 N. B. Rep. 96; *Re Frank*, Fed. Cas. 5050, 5 N. B. Rep. 194; *Re Bliss*, Fed. Cas. 1543, 1 N. B. Rep. 78; *Re Wetmore*, Fed. Cas. 17466, 16 N. B. Rep. 514; *Re Rekersdres*, 108 Fed. Rep. 206, 5 Am. B. Rep. 811.

² *Falter v. Reinhard*, 104 Fed. Rep. 292, 4 Am. B. Rep. 782, 106 Fed. Rep. 57, 5 Am. B. Rep. 155; *Re Henschel*, *supra*; *Matter of Law*, 13 Am. B. Rep. 650.

³ *Dayville Woolen Co.*, 114 Fed. Rep. 674, 8 Am. B. Rep. 85.

⁴ Bankruptcy Act of 1898, § 45.

⁵ *Boston Dry Goods Company*, 125 Fed. Rep. 226, 11 Am. B. Rep. 97; *Re Henschel*, *supra*.

⁶ Bump, Bankruptcy, 10th ed., 132. Cf. also *Ex parte Sheard*, L. R. 16 Ch. D. 107.

⁷ *Re Lewensohn*, *supra*.

⁸ A person who had accepted an unlawful preference. Act of 1867, § 5035.

was given to the district judge, with power to order a new election when "needful or expedient," the court considered it was justified in withholding its approval of the election only where there was a want of capacity or integrity in the candidate elected. Otherwise he was assignee "by virtue of the law."¹

The real point at issue is not whether the trustee so chosen is qualified so as to be approved or disapproved by the referee, but whether the votes which were wrongfully influenced by the bankrupt shall be accepted. There is no doubt that a creditor is the only person entitled to vote for a trustee. If the referee upon inquiry learns that the bankrupt is casting the votes in his creditors' names, it is obvious that he may reject such votes. If there is fraud practised on a creditor who votes in person, it is not much more difficult to find that, although it is the creditor who goes through the form of voting, yet in fact it is the bankrupt who casts the vote. So, too, in a case of collusion between a creditor and the bankrupt, it is the bankrupt who by consent of such creditor casts the vote in the creditor's name. In each of these cases it is the bankrupt's voice which is substituted for his creditors' in selecting the trustee. Just as the English Bankruptcy Law separates the objections which attack the election on the ground that the appointment was not made in good faith into a different class from those objections dealing with the personal fitness of the appointee, so this method of dealing with our problem distinguishes the question of the votes from all questions of approval or disapproval of the trustee elected.

The natural hesitancy of a referee formally to disapprove of the selection of some gentleman of character and standing in the local community who has been ensnared into the bankrupt's scheme often results in a substantial denial of the rights of the creditors to elect their trustee.² It befores the issue and begs the whole question for the referee to resort to a question of disapproving of the trustee. In fact, what the creditors ask the court to pass upon is not whether the trustee is personally qualified or disqualified, but whether or not he has been elected to the office by the votes of the creditors. When a referee finds that the bankrupt directly or indirectly controlled the votes, he finds that the creditors did not cast the votes. Just as in any election for any office the election

¹ *In re Barrett*, Fed. Cas. 1043, 2 N. B. Rep. 533; *Re Grant*, Fed. Cas. 5693, 2 N. B. Rep. 106. *Contra, Re Wetmore, supra; Re Bliss, supra.*

² *Re Boston Dry Goods Co., supra.*

judges reject false votes, irrespective of the candidate for whom they are cast, so in such cases it is the duty of the referee to refuse these votes without passing on the qualifications of the appointee.

Moreover, there is an additional advantage in rejecting the votes rather than in disapproving of the trustee. If the court withholds its approval, it can neither declare the rival candidate elected, nor appoint a trustee of its own choosing. It can only order a new election.¹ There is no promise that a second election will yield any better results. By rejecting the fraudulent or corrupted votes the ballots of the independent creditors will control the election, and the court may be assured of a competent official who is the real choice of those creditors of the bankrupt who are alert in their own interests and have no ulterior object other than the best possible administration of the bankrupt's estate.

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¹ *Re Scheiffer & Garrett*, Fed. Cas. 12445, 2 N. B. Rep. 591; *Re McKellar*, 116 Fed. Rep. 547, 8 Am. B. Rep. 699; *Re Hare*, 119 Fed. Rep. 246, 9 Am. B. Rep. 520.

A NEW PHASE OF EQUITABLE ESTOPPEL.

THE first distinctive enunciation of the modern doctrine of equitable estoppel was given by Lord Chief Justice Denham, in 1837, in the well known case of *Pickard v. Sears*,¹ in these words:

"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

This rule, which has since been greatly extended, originated in the court of chancery, but is now generally applied to cases arising in common law courts. While the doctrine is a salutary one, and founded in the main upon equitable principles, it becomes odious when not justly or reasonably applied. Estoppel being a rule of evidence, a cause of action cannot be founded upon it. Although regarded by many as rigorous and inequitable, it has gradually grown into favor since Lord Chief Justice Mansfield in 1762, in *Montefiori v. Montefiori*,² impressed it upon our legal system in the following forceful words:

"Where third persons represent anything material, in a light different from the truth, . . . they shall be bound to make good the thing, in the manner in which they represented it. . . . For no man shall set up his own inequity as a defence, any more than as a cause of action."

Not being a cause of action, the measure of damage in the application of this doctrine is not compensation, but the placing of the one relying upon it in the same position as if the representation, or assumed state of facts, were true.

Quite recently an important judgment was delivered in the Supreme Court of Canada, *Ewing v. Dominion Bank*,³ involving a principle of equitable estoppel, which has elicited much comment, not less among the profession than in commercial circles and banking institutions. Its decision settled, as far as the court of last

¹ 6 Ad. & E. 474.

² 1 Black. W. 363.

³ 35 Can. Supreme Ct. 133.

resort for the Dominion can settle, a question of considerable importance respecting forged paper discounted by a bank. The judgment cannot be said to be satisfactory for two reasons. First, the court was a divided one, three sustaining the judgment of the inferior court and two dissenting. In the second place, the amount of the judgment assessed for the plaintiff (below), the Dominion Bank, was so manifestly inequitable as to suggest the odium, which Lord Coke designated as attaching to estoppels generally. A somewhat detailed account of the facts of the case is necessary in order to form a just conception of the decision.

The plaintiff is a chartered bank having its head office at Toronto. The defendants, William Ewing & Co., are a well known firm of seed merchants in Montreal. One Wallace, managing clerk of the Thomas Phosphate Co., of Toronto, finding the company in sore need of money, on August 14, 1900, forged the name of William Ewing & Co. to a promissory note for \$2,000, at four months, made payable to the Thomas Phosphate Co. at the Dominion Bank, Toronto. Wallace, on August 15th, procured the forged note to be discounted by the said bank, and the proceeds placed to the credit of the company in the bank. On the same day the assistant manager of the bank sent notice to Ewing & Co. that their note for \$2,000, in favor of the Thomas Phosphate Co., would fall due on December 17, 1900, and they were requested to provide for the same at maturity. This notice was received by Ewing & Co. on the morning of August 16th. On the 15th, the day of discount, Wallace checked out part of the proceeds, so that at the close of business, on the 15th of August, the Phosphate Co. had at the credit of its account, at the bank, \$1,611.65; by the 18th Wallace had drawn all but \$70.

Ewing & Co. on receipt of the notice sent them by the bank, on the 16th, at once telegraphed to Wallace, whom they had personally known, asking what the notice meant. On the same day Wallace telegraphed from Boston to Ewing & Co., saying he was coming to Montreal and would explain why the bank held the note. On the 18th, he telegraphed again to Ewing & Co. to arrange to see him on the 19th. On the last named day Wallace reached Montreal, and then made known his forgery of the note, and promised to take steps to retire the same at any early day, and begged of Ewing & Co. not to let the bank know of the forgery. Wallace failed to make good his promises. From that time for nearly four months an active correspondence was carried

on between him and Ewing & Co., Wallace pleading for time to raise the money, and beseeching them not to notify the bank, and they urging him with threats and entreaties to retire the note as agreed. Wallace's efforts to extricate himself proved unavailing. On December 4, 1900, the bank again notified Ewing & Co. that the note would mature on December 17th, and would be obliged if they would kindly provide for the same. On December 10th, Ewing & Co. wrote the bank denying they were the makers of the note, and on the same day also notified Wallace that they had informed the bank to the like effect. Wallace left the country about the time the note matured. On suit brought by the bank, the defendants denied the making of the note, and the bank counter claimed that if the signature were a forgery they were estopped by their conduct from denying it.

The cause was tried in September, 1902, by Meredith, J., without a jury, and judgment passed for the plaintiff for the full amount of the note with interest amounting to \$2,230, besides costs of action. The judgment did not proceed on the ground of ratification of the forged note by the defendants; but by reason of the defendants being estopped by their conduct from denying the making, the court holding it to be the legal duty of a person whose name has been forged to inform the holder of the forged instrument of the fact promptly after becoming aware of it; and that such a person becomes liable upon it if, by reason of neglect of such duty, the holder's position is altered for the worse.

On appeal to the Court of Appeal for Ontario, the judgment was unanimously sustained. The Court of Appeal held that the judgment could not be supported on the ground of ratification; on the other hand, it could rest only upon estoppel. Chief Justice Moss, after referring to the conduct of the defendants, in their attempt to shield Wallace, held that their silence for the benefit of the forger resulted in the bank's position being thereby materially altered to its prejudice, and that consequently the defendants were estopped from denying their liability upon the note.

In order to form a just conception of the import of this judgment it may here be stated that the evidence discloses that, when the forged note was presented for discount, the bank knew the Phosphate Co. was practically worthless; that the bank never had any previous dealings with the firm of Ewing & Co., had no knowledge of their signature, and made no inquiry as to the standing of the firm, or as to the genuineness of the signature, but acted entirely

upon the representation of Wallace; that the note was drawn on a Toronto form, notwithstanding the defendants resided in Montreal; that the note, apart from the printed portions, was filled up in two different handwritings, facts that would reasonably awaken suspicion; that the notice was not sent by the bank to Ewing & Co. to elicit a response as to the genuineness of the signature; and that the fact that they did not receive an answer to the notice in no way influenced the bank as to the disposition of the balance of the funds in their hands.

The counsel on behalf of the appellants contended, that they were entitled to a reasonable amount of time to make inquiries in order to satisfy themselves a forgery had been committed, and no duty to speak was cast upon them until assured of its commission; that when such knowledge was obtained by the confession of the forger on August 19th, the proceeds of the note had been substantially withdrawn; and that by the silence of the defendants after the 19th the position of the bank had not been materially altered for the worse. On behalf of the bank it was contended there was evidence to show that prompt notice would have enabled the bank, by refusing payment of the forger's checks, to have retained a part at least of the proceeds of the note, as well as other moneys afterwards withdrawn by the forger, and want of such notice prevented the bank from taking civil or criminal action or other course against the forger before he absconded.

The judgment of the Court of Appeal of Ontario was affirmed by the Court of Appeal for the Dominion of Canada, two judges dissenting.¹ Mr. Justice Nesbitt in his dissenting opinion, after concluding that in order to create a duty on the part of Ewing & Co. to notify the bank that the note was not theirs, the bank should have given some reason to Ewing & Co. to suppose that it would be prejudiced by their silence, proceeds:

"I think, that, in any event, until the interview on Sunday the 19th Ewing & Co. were not bound to assume a crime had been committed and that their explanation, which was adopted by the Court of Appeal, that, although they had not made a note, the slip by mistake or error on the part of the clerk in the bank might refer to an advice of a draft intended to be drawn upon them, was reasonable, and they were not bound to suppose a crime had been committed; and Wallace's telegram would certainly lead them to suppose he had a reasonable explanation and that they were justified in waiting until Sunday the 19th, and at that time any telegram or other

¹ See *Ewing v. Dominion Bank*, *supra*.

notice at the bank would have been quite ineffective. It was not pretended that the bank was in any worse position as to arrest by not receiving notice until the 10th of December. . . . It seems to me that even the extreme altruistic view referred to by Mr. Ewart in his work on Estoppel, page 38, does not justify a court in making a man pay a note which he did not sign when the person who discounted the note relied entirely for the genuineness of the signature upon the representation of the party discounting it and did not communicate, in any way intending or relying upon such communication, with the party sought to be charged."

The counter view of the case was briefly expressed in the following terms by Mr. Justice Killam:

"The case appears to me to come directly within the principle upon which silence under certain circumstances gives rise to an estoppel. The bank directly notified the defendants that their note would fall due at its office on a certain date and requested them to provide for the same. This distinctly implied that the bank had an interest, either of its own or on behalf of some one else, in the payment of the note and in its genuineness. While there was no intimation that the bank had acquired or was proposing to acquire the note for value, the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already advanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose. While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendants' silence in the sense that it did what, it should properly be inferred, it would not have done if the defendants had at once denied the signature; it allowed the balance of the proceeds to be withdrawn."

Special leave to appeal, from the Supreme Court of Canada, to His Majesty in Council was asked and refused. So here ends the case. *Curia summa locuta est; causa finita est.* And who can say strict justice has been done? The case seems a particularly hard one for the defendants. They were brought, not by their own seeking or concurrence, into unpleasant relationship with a bank and one of its customers. When the notice referred to reached them, on the morning of the 16th of August, the damage

complained of had in part been done. When, on the 19th of August, they first learned from the lips of Wallace that their signature to the note in question had been forged by him, the whole damage had been done. And yet, in consequence of subsequent silence, they were compelled to pay the note in full, and thus make full reparation for the entire damage.

As the damages assessed by the trial judge were neither exemplary nor punitive, as in actions for deceit or misrepresentation, the judgment can be defended only on the ground of the application of a rigorous rule of evidence, which excludes a finding of the actual loss sustained by the plaintiff, and places the person relying on the estoppel in a better position than that which his own initiative materially assisted in generating. In fine, an estoppel goes to the extent of preventing an adjustment of the damage actually incurred or of ascertaining in how much worse condition the plaintiff has been placed by reason of the conduct of the one sought to be estopped. Against such technical injustice able judges have from time to time entered a vigorous protest; notably Lord Justice James, in his judgment in *In re Collie*.¹ The learned editors of Smith's Leading Cases hold with much show of reason, that it savors of injustice to allow the position of the person relying on the estoppel to be made better by the act of the estopped, simply on the ground he is precluded, by a not very well defined rule of evidence, from stating the real truth of the case. It would seem strict justice should rather demand, that the plaintiff should be relegated simply to the same position he would have occupied, had he not acted upon the representation or act complained of. It is to be hoped, however, notwithstanding that the more rigorous doctrine still prevails, that in the language of the editors referred to, in the closing words of their comments on the Duchess of Kingston's case — "Possibly the greater flexibility introduced into our system by the Judicature Acts may eventually lead to an alteration in this respect."

Silas Alward.

ST. JOHN, N. B.

¹ 8 Ch. D. 816.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table : —

	1894-5	1895-6	1896-7	1897-8	1898-9	1899-1900
Res. Grad. . . .	—	—	—	I	I	—
Third year . . .	82	96	93	130	102	134
Second year . . .	135	138	179	157	169	193
First year . . .	172	224	169	216	218	232
Specials	13	9	31	41	58	51
	<u>402</u>	<u>467</u>	<u>472</u>	<u>545</u>	<u>548</u>	<u>610</u>

	1900-01	1901-02	1902-03	1903-04	1904-05	1905-06
Res. Grad. . . .	I	I	—	4	I	I
Third year . . .	144	149	167	180	182	192
Second year . . .	202	190	196	201	232	216
First year . . .	241	229	228	293	285	243
Specials	58	59	49	60	58	64
	<u>646</u>	<u>628</u>	<u>640</u>	<u>738</u>	<u>758</u>	<u>716</u>

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts : —

HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148

HOLDING NO DEGREE.

Class of	From Mas- sachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	TOTAL OF CLASS.
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243

As the twenty-four Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the sixty-four special students, fifteen have entered this year, and of these ten are graduates of a college or university, six having received a degree in law.

One hundred and eighteen colleges and universities have representatives now in the School as compared with one hundred and fourteen last year and

one hundred and eleven the previous year. In the first year class sixty-five colleges and universities, as compared with sixty-nine last year, are represented, as follows: Harvard, 71; Yale, 20; Brown, 11; Dartmouth, 11; Princeton, 10; Bowdoin, 8; Williams, 6; Georgetown, 5; Clark, Hamilton, Wesleyan (Ct.), 4; California, Carleton, Cornell University, Iowa College, 3; Amherst, Central, Kansas, Stanford, Ohio State, Wisconsin, 2; Allegheny, Austin, Boston College, Boston University, Chicago, Coe, Colby, Columbia, Denison, De Pauw, Doane, Fisk, Franklin, Gustavus Adolphus, Hobart, Holy Cross, Illinois College, Illinois University, Indiana, Iowa University, Knox, Lombard, Maine, Miami, Middlebury, Minnesota, Missouri, Montana, Mt. Allison, Nebraska, Nevada, New Brunswick, North Carolina, Northwestern, Ohio, St. Louis, St. Vincents, South, South Carolina, Swarthmore, Virginia, Washington and Jefferson, Western Reserve, Wheaton, 1. There are at present in the School eleven law school graduates, five of whom hold academic degrees also, representing the following law schools: Boston University, Columbia, Dickinson, Harvard, Iowa University, Maryland, Oxford, Pennsylvania, St. Louis, Stanford.

INHERITANCE TAXES ON SUBSEQUENTLY VESTING CONTINGENT REMAINDERS. — Like so many other broad concepts of Constitutional Law, that of vested rights is hardly reducible even to a working definition. The distinction is generally drawn between "vested" rights and mere "expectancies," which the legislature may freely impair.¹ Thus, various property rights incident to the marriage status are at the legislative mercy. Dower, being inalienable before assignment, may before assignment be diminished or destroyed.² On the other hand, the extent of legislative control over curtesy is in dispute. Yet since curtesy initiate is a present interest, alienable and subject to debts, though the enjoyment is postponed, the better doctrine regards it as a vested right.³ There is a similar diversity of opinion as to the power of the legislature to deprive the husband of his common law right to reduce his wife's choses in action to possession.⁴ Again, the old right of survivorship in joint tenancies may concededly be destroyed by turning them into tenancies in common.⁵ But the most widely recognized field of legislative control is found in the laws governing descent and distribution.⁶ Inheritance is a privilege, not a right. Heirs presumptive and testamentary beneficiaries have only a present, destructible opportunity of taking under existing expressions of governmental policy as to the disposition of a deceased's property.

This line of reasoning sustains our numerous inheritance taxes.⁷ The state exacts a bounty on the passing of property by will or intestacy. It is a tax on the privilege of transmission, — not a tax on its receipt, or on property because of ownership. That is the source of the revenue, though the appraisal of interests then created may be postponed because of the difficulty of assessing until contingencies in the way of its possible enjoy-

¹ Cooley, *Const. Lim.*, 7th ed., 508 *et seq.*

² *Randall v. Kreiger*, 23 Wall. (U. S.) 137. But see *Dunn v. Sargent*, 101 Mass. 336

³ See *McNeer v. McNeer*, 142 Ill. 388.

⁴ See note to *Westervelt v. Gregg*, 12 N. Y. 202, in 62 Am. Dec. 160.

⁵ *Holbrook v. Finney*, 4 Mass. 565.

⁶ See *Marshall v. King*, 24 Miss. 85.

⁷ *Matter of Swift*, 137 N. Y. 77, 88; *Knowlton v. Moore*, 178 U. S. 41, 47.

ment are removed.⁸ And yet the Supreme Court has sustained an assessment, under the New York statute, upon an estate appointed under a power granted before the existence of the tax but exercised, by will, thereafter.⁹ But this is no exception to the above doctrine, for the interest is regarded as created as of the time of the exercise of the power, and the state is there again levying on a testamentary disposition. But the New York Court of Appeals decided that a vested remainder is not subject to a subsequently enacted inheritance tax law.¹⁰ The same court now accords similar protection to a contingent remainder. *Matter of Lansing*, 182 N. Y. 238. In other words, from the constitutional, as distinguished from the conveyancing point of view, it regards a contingent remainder as a vested right. While there are important technical differences between vested and contingent remainders in the law of Property, there is little difference in substance. Whether a remainder is vested or contingent is largely a matter of phraseology, and that can hardly control the immediate question. Alienability seems to be, perhaps, the common element of interests that are protected as vested. At common law contingent remainders were inalienable and could be destroyed by tortious feoffments. But the differences in the property incidents of the two classes of remainders have now been almost universally nullified by statute. In most jurisdictions contingent remainders are now alienable and indestructible except by the contingencies on which their fate depends.¹¹ The owner of a contingent remainder has, therefore, a vested right to have the estate when the contingency happens, and that right the legislature should not be permitted to impair by levying a transfer tax for a privilege which has previously ripened into a right. It is conceived, however, that when the remainder is limited to a living man's "heirs," the state may, prior to its vesting, tax the receipt of such property. For to allow a man to become the heir of any person is a privilege which the state may withdraw or alter, and may therefore charge for permitting to continue.

LAW GOVERNING POWER OF APPOINTMENT BY WILL. — In considering what law determines the sufficiency of a will as an exercise of a testamentary power of appointment over personalty, two questions are involved: First, is the instrument, alleged to exercise the power, such a "will" as satisfies the direction of the donor of the power, that the power shall be exercised "by will"? Second, if it is a valid will, does it amount to an exercise of the power? Both of these questions may come up for decision in cases where the donee of a testamentary power of appointment dies domiciled in a different country from the donor, leaving a will which is alleged to exercise the power. In such cases the execution of the power is commonly to be found, if at all, in a universal legacy contained in the will, no direct reference to the power or the property subject thereto being made by the testator.

In both England and the United States the instrument in question is held to be a sufficient "will" if made in accordance with the law of the

⁸ *Matter of Seaman*, 147 N. Y. 69.

⁹ *Orr v. Gilman*, 183 U. S. 278. See also *Carpenter v. Commonwealth*, 17 How. (U. S.) 456; *Gelsthorpe v. Furnell*, 20 Mont. 299, 310.

¹⁰ *Matter of Pell*, 171 N. Y. 48.

¹¹ 21 L. Quar. Rev. 118, 119, note.

domicile of the donee at his death.¹ This seems a necessary application of the broad doctrine that a will of movables which is valid by the law of the testator's domicile at his death is valid in other countries.² In England, by a further extension which is established by authority but questioned as to principle, the power may also be exercised by a will conforming to the law of the donor's domicile.³ A will not conforming to the law of the donee's domicile, but admitted to probate by statute,⁴ is held in England incapable of exercising the power unless executed according to English law.⁵

Whether a given will constitutes an exercise of the power is determined in the United States by the law of the domicile of the donor.⁶ This rule rests on the theory that the donee is merely the agency through which the donor designates the beneficiary, who takes under the instrument creating the power and not under that by which the power was exercised.⁷ In an English case, however, the law of the donee's domicile is taken to govern.⁸ The decision in this case is not so strong as the American decisions, for the instrument in question was not a good execution of the power by the law of the donor's domicile, and to the law of the donee's domicile powers of appointment were unknown. The case has been followed in a recent English decision which adopts its conclusion on similar facts, but leaves in confusion the question whether the law of the donee's or that of the donor's domicile governs. *In re Scholefield*, 21 T. L. R. 675.

The view taken by the English court, that the question whether the will constituted an execution of the power is to be determined by the law of the donee's domicile, seems sound. Even if the donee is a mere agent of the donor, he has an option of exercising the power, and his intention in this respect is not subject to the donor's control. The question being whether the power was exercised or not, the intention of the donee would seem the test. His intention, however, may not appear in the will. Indeed, in the common case, the will makes no reference to the power or to the property over which the power is held, but the only language from which an execution of the power may be found is that of a universal legacy. Where the intention does not clearly appear, but has to be found by implication from the language of the will, the law which decides whether it will thus be found should be the law with regard to which the will was written. That law is presumably⁹ the law of the domicile of the donee.¹⁰

DUPLICATES AS PRIMARY EVIDENCE. — Any one of duplicate instruments may be introduced in evidence without accounting for any other.¹ In this

¹ *D'Huart v. Harkness*, 34 Beav. 324; see *Ward v. Stanard*, 82 N. Y. App. Div. 386.

² Dicey, *Conflict of Laws* 684.

³ *In the Goods of Huber*, [1896] P. 209; *In the Goods of Hallyburton*, L. R. 1 P. & D. 90.

⁴ St. 24 and 25 Vict. c. 114, § 1.

⁵ *Hummel v. Hummel*, [1898] 1 Ch. 642; see also *In re Kirwan's Trusts*, 25 Ch. D. 373.

⁶ *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. St. 345.

⁷ *Cotting v. De Sartiges*, 17 R. I. 668, 671.

⁸ *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898.

⁹ Cf. *In re Price*, [1900] 1 Ch. 442.

¹⁰ Wharton, *Conflict of Laws*, 3d ed., 1315.

¹ 2 Wigmore, Ev. § 1232.

connection, however, the term duplicate signifies more than a mere copy:² the instruments must be identical not only verbally but also in legal import.³ Early examples of duplicate originals were the counterparts of deeds.⁴ These became originals, not because of any coincidence of writing, but because they were delivered together. Each instrument thereby became operative as a deed, because that was the intention of the parties.⁵ So, too, if the parties to a bilateral contract draw up the written contract in duplicate, each taking a copy, either party may produce his copy without accounting for the absence of the original, even though his own signature be lacking from the instrument.⁶ In such cases it is obvious that nothing depends on the manner in which the instruments were written or printed.

In the case of most written or printed matter, however, intention affords no test. A man who writes to accept an offer one day cannot on the next day make a copy of his acceptance which shall be available in evidence as a duplicate original merely by "intending" that the copy shall operate as such. The question will now depend on the nature of the process by which the alleged duplicate has been produced. And here the line seems to be drawn between duplicates in the strict sense and copies. Thus, letterpress reproductions are not admissible, because really not duplicates, but copies of an original.⁷ Printed "copies," on the other hand, are true duplicates, being all produced from the same types, and so are admissible.⁸ In accordance with this distinction the Virginia court has recently declared that carbon "copies" of a letter, made by the same impression as the letter, are admissible as duplicate originals. *Chesapeake & Ohio Ry. Co. v. Stock & Sons*, 51 S. E. Rep. 161. This opinion (which, however, was not necessary to the decision in the case) seems correct. A carbon "copy" is as much an original as to printing as the letter itself, since the production of both is practically instantaneous. The present case, therefore, may properly be classed with the printing-press cases. Nor is the objection sound that, as no signature is ordinarily made on the carbon copy, such copy cannot be of the same legal import as the document which is signed. In the class of cases under discussion the contents of the document, not the signature, are in legal issue. A more serious difficulty is the danger that false evidence will be manufactured. If the other party, however, holds the original letter sent to him, the fraud may easily be shown; and if he does not hold it, the copy would be admissible as secondary evidence. At all events, the risk of fraud is probably counterbalanced by practical advantages. It has become important to business men to have some record of their business correspondence which can readily be produced without the inconvenience of accounting for the originals. To treat carbon copies as originals seems, therefore, sound and progressive as well as technically correct.

But is the test that both instruments must be made by the same mechanical process satisfactory? If letterpress copies are uniformly accurate, the distinction between them and carbon copies, made in the regular course of business, seems merely technical. The real test, then, of whether instru-

² *Toms v. Cuming*, 7 M. & G. 88.

³ *Nelson v. Blakey*, 54 Ind. 29.

⁴ *Lewis v. Payn*, 8 Cow. (N. Y.) 71.

⁵ *Leonard v. Young*, 4 All. (N. B.) 111.

⁶ *Cleveland & Toledo R. R. Co. v. Perkins*, 17 Mich. 296.

⁷ *Nodin v. Murray*, 3 Camp. N. P. 228.

⁸ *Rex v. Watson*, 2 Stark. N. P. 116.

ments are duplicates would seem to be whether there is substantial certainty of identity among them. If so, they should be allowed to be introduced as primary evidence.

AGREEMENTS IN RESTRAINT OF TRADE BY COPYRIGHT-HOLDERS AND PATENTEES. — "To promote the progress of science and useful arts," Congress, under powers conferred by the Constitution,¹ has secured to authors and inventors by means of copyrights and patents the exclusive right to produce and "to vend" their writings and discoveries.² This statutory right of monopoly seems naturally to carry with it the right to employ ordinary and reasonable means of enforcing the monopoly. Thus, a copyright-holder or patentee is allowed to make such contracts with the vendee of the protected article as he wishes. Stipulations, for instance, that the vendee shall sell only for a fixed price or under certain conditions have been held valid, and the breach of them enjoined.³ Yet beyond the strict scope of this statutory exemption it seems clear that the holders of copyrights and patents should be bound by the same common law and statutory restrictions upon contracts and combinations in restraint of trade as are the owners of other property. The test is whether or not the acts in question tend toward the establishment of a new monopoly. Obviously, it would seem that a new monopoly is being attempted when the holders of separate copyrights or patents on articles of the same general class combine for the purpose of controlling the market in the general class of commodities, the particular varieties of which are the subjects of the separate copyrights or patents. The Court of Appeals of New York has, nevertheless, intimated an opinion that a combination among publishers of copyrighted books to boycott all jobbers and booksellers who should not maintain the net prices of copyrighted books fixed by the individual members of the combination, is not illegal as being in restraint of trade.⁴ More recently, however, a federal court strongly maintained the contrary view. *Bobbs-Merrill Co. v. Straus*, 139 Fed. Rep. 155. (Circ. Ct., S. D. N. Y.)

The position taken by the federal court seems eminently sound. The copyright and patent laws confer a monopoly as respects the property covered by them; but it seems unreasonable to construe them as conferring on the owners of several distinct copyrights or patents a right to combine to restrain competition and trade.⁵ Such combinations are, from the public standpoint, especially undesirable. In general, it is only the competition between different copyrighted and patented commodities substantially subserving the same general want that has made copyright and patent laws tolerable. The monopoly price of the protected articles is kept down by this sort of imperfect competition; this competition withdrawn, the prices would rise from those at which people would do without that particular commodity to those at which they would do without that class of commodities.

The question as to the illegality of such combinations or agreements must, however, be carefully distinguished from the question as to the effects

¹ U. S. Const. Art. I, § 8, clause 8.

² 26 U. S. Stats. at L. 1106; 16 *ibid.* 201.

³ *Garst v. Harris*, 177 Mass. 72; *Fowle v. Park*, 131 U. S. 88.

⁴ *Straus et al. v. Am. Pub. Assn.*, 177 N. Y. 473. Cf. *Park & Sons Co. v. Nat., etc., Assn.*, 175 N. Y. 1.

⁵ *National Harrow Co. v. Hench*, 83 Fed. Rep. 36, 38.

of the illegality. The illegality of a combination or agreement of copyright-holders and patentees taints the transactions of the combination and its members just so far and only so far as it would, were the property involved not the subject of patents and copyrights.⁶ Thus a contract licensing the sale of a patented article, made in direct pursuance of the unlawful objects of an illegal combination is held unenforceable.⁷ On the other hand, in a suit brought by the owner for the infringement of a copyright or patent, it is no defence that the plaintiff is an illegal combination or a member of it.⁸

ESTOPPEL AGAINST STATE AND UNITED STATES. — At common law and in some of our states, estoppel could not be set up against the sovereign.¹ It is now clear, however, that estoppel by record applies to the state or federal government. Thus, when a state recovered judgment for taxes due during certain years, it was estopped in another action to recover an alleged balance for the same years.² By the weight of authority, also, estoppel by deed may be set up against the government. Thus, where a state, for valuable consideration, granted land to an alien, his heirs and assigns, with warranty, it was estopped to set up the alienage of the grantee or of his heirs as ground of an escheat.³ Estoppel *in pais*, or equitable estoppel, against the government, however, has not in general met with favor among the states.⁴ In support of the prevailing view, courts find an analogy in the rules exempting the state from the operation of the statute of limitations and from the doctrine of laches. But the government is here exempt not from any notion of extraordinary prerogative, but for reasons of public policy. Since the fiscal transactions of the government are so numerous and its agents so scattered, it is apprehended that the utmost diligence on the part of the government might not save the people from loss through outlawed claims. Estoppel *in pais*, however, rests on principles of universal justice. "When matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain."⁵ When the government engages in commercial transactions, it is subject to the same laws that govern individuals. Thus, when it becomes a party to negotiable paper, it has the rights and assumes the liabilities of individuals in a similar position, except that it cannot be sued.⁶ There seems, therefore, no good reason why the government should not be estopped, like an individual.⁷

⁶ 1 Page, Contracts 698. See *Strait v. National Harrow Co.*, 51 Fed. Rep. 819, 820.

⁷ *National Harrow Co. v. Hench*, 76 Fed. Rep. 667; affirmed in 83 Fed. Rep. 36. Cf. *Gamewell, etc., Co. v. Crane*, 160 Mass. 50; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.

⁸ *Edison, etc., Co. v. Sawyer-Iman, etc., Co.*, 53 Fed. Rep. 592; *American, etc., Co. v. Green*, 69 Fed. Rep. 333; *General Electric Co. v. Wise*, 119 Fed. Rep. 922. But see *contra*, *National Harrow Co. v. Quick*, 67 Fed. Rep. 130.

¹ See *Queen v. Delme*, 10 Mod. 199, 200; *Taylor v. Shufford*, 4 Hawks (N. C.) 116, 132; *State v. Williams*, 94 N. C. 891, 895.

² *Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 716. See also *Fendall v. United States*, 14 Ct. of Cl. 247.

³ *Commonwealth v. André*, 3 Pick. (Mass.) 224.

⁴ See *People v. Brown*, 67 Ill. 435.

⁵ *United States v. Willamette Val. & C. M. Wagon-Road Co.*, 54 Fed. Rep. 807, 811.

⁶ *United States v. Bank of Metropolis*, 15 Pet. (U. S.) 377, 392; *United States v. Barker*, 12 Wheat. (U. S.) 559.

⁷ See *United States v. Stinson*, 125 Fed. Rep. 907; *State v. Flint & P. M. R. R.*, 89 Mich. 481; *State v. Milk*, 11 Fed. Rep. 389.

Enactments or resolutions of the legislative body clearly estop the government. Where the legislature, by public resolve, declared a certain monument to be the one referred to in an ancient Indian deed, the state was estopped from showing afterwards that it was not the monument referred to.⁸ The acts of its agents, when fraudulent or unauthorized, do not estop the government, even when the agents act within the apparent scope of their authority; but this rule may be rested on the presumption of law that those who deal with public officers know the extent of their authority.⁹ On the other hand, acts of agents as well as of the legislature, ought to estop the government, if the agents are authorized to shape its conduct in a particular transaction and have acted within the purview of their authority. Where, for instance, under a mistake of fact a public officer overpaid a corporation for its services in carrying the mail, the government was estopped to recover this money from a second corporation which had become the owner of the first, relying on the settlements made with the first by the agent of the government.¹⁰ Even those courts, however, which accept the general principle that the state may be estopped *in pais* by acts of its agents seem still to be feeling their way, and apply the principle with extreme caution. A recent federal decision furnishes a good illustration of this attitude. *Walker v. United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D. Ala.). The facts of the case were strong, and the estoppel was allowed, but the court circumspectly declined to commit itself to a more concrete declaration than that the rule would be applied "in a proper case." What is a proper case no court seems yet to have attempted to define.

LEGISLATIVE AUTHORIZATION OF NUISANCES. — Varying expressions of opinion are found in the books as to how far a legislature can authorize what would otherwise be a private nuisance, without providing for the constitutional compensation for the "taking" of private property. The cases seem to confine this form of protection rather strictly to instances of an actual seizure of physical property.¹ When, for example, a chartered railroad encroaches upon none of his land, a person whose real estate deteriorates in value by reason of the smoke, noise, and other concomitants of the proper operation of the road has no redress.² But if part of the plaintiff's land is occupied, compensation is often made not only for that portion and for the diminution in value of the remainder caused by the alteration in shape and size, but for the further depreciation resulting from the inevitable smoke, noise, cinders, and jarring created in the operation of the railroad on the portion condemned.³ Thus, under the guise of compelling payment for land taken, are exacted damages for what is practically a nuisance to be maintained on that land. This eminently equitable result could, however, be reached without artifice simply by placing a less strict construction

⁸ *Commonwealth v. Pejepscut*, 10 Mass. 155.

⁹ *Dement v. Rokker*, 126 Ill. 174, 199; *Filor v. United States*, 9 Wall. (U. S.) 45.

¹⁰ *Duval v. United States*, 25 Ct. of Cl. 46. See also *Hartson v. United States*, 21 Ct. of Cl. 451; *People v. Stephens*, 71 N. Y. 527, 561.

¹ See *Garrett v. Lake Roland El. Ry. Co.*, 79 Md. 277.

² *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. Law 235; *Carroll v. Wisconsin Cent. Co.*, 40 Minn. 168.

³ *Bangor, etc., R. R. Co. v. McComb*, 60 Me. 290. See *Walker v. Old Colony, etc., Ry. Co.*, 103 Mass. 10.

upon the constitutional phrase "taking of property." Property, in the constitutional sense, say many respectable authorities, consists not in the plot of land, but in the right to use it undisturbed.⁴ Hence several decisions have called that a taking which without an entry by the trespasser virtually made the enjoyment by the ostensible owner impossible, as by a flood of water or of sand.⁵ Others more broadly hold that an easement is property, the taking of which must be paid for.⁶ The idea of property on which these cases proceed would lead to the conclusion that any material abridgment of rightful user is the taking of property.⁷ On this theory, therefore, recovery might be had for all nuisances, however the legislature had attempted to sanction them, so far as they interfered with the comfortable enjoyment of an individual's land or chattel. This would make possible the collection of damages from a railroad company by very many whose land is situated near its line. Such incidental injuries, however, are said by the courts to be of that class which must be suffered for the common welfare, and which are too slight substantially to impair the rights of property recognized and protected by the state. That this position is logically inconsistent with any but a strict interpretation of constitutional phraseology has already been indicated, and that it is not even unequivocally desirable on grounds of public welfare is shown by the more modern constitutions and statutes, which provide for compensation when property is taken or damaged. Even these, however, under the narrow definition of property, leave many injured parties without a remedy.⁸

But whether or not the constitution is construed to assure compensation for an authorized nuisance the extent of the authorization is closely scrutinized. It may be because of such want of authorization that in a recent Texas case a householder was allowed to recover for mere personal inconvenience and annoyance arising from the operation of a freight depot near her premises. *St. Louis, etc., Ry. Co. v. Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). A line of track authorized by legislative enactment necessarily entails certain inconveniences to a large share of the public, but freight yards, water-tanks, and round-houses are structures which may and therefore are intended to be located where they will be of the least possible harm to the community. For any nuisance due to their improper location the railroad is unquestionably liable.⁹

CONSTRUCTIVE TRUSTS ARISING ON BEQUESTS ON SECRET UNDERSTANDINGS. — It has recently been held in New York, that where a will recited that a bequest was to be used as the testator had ordered in his lifetime,

⁴ Lewis, *Eminent Domain*, §§ 54, 55. See *Eaton v. Boston, etc., R. R.*, 51 N. H. 504, 511; *Shaw, C. J. in Old Colony, etc., Ry. Co. v. County of Plymouth*, 14 Gray (Mass.) 155, 161.

⁵ *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166; *Eaton v. Boston, etc., R. R.*, *supra*.

⁶ See *Lamm v. Chicago, etc., Rd. Co.*, 45 Minn. 71.

⁷ Lewis, *Eminent Domain*, § 56; *Cooley, Const. Lim.*, 7th ed., 787, 788; *City of St. Louis v. Hill*, 116 Mo. 527; *Forster v. Scott*, 136 N. Y. 577; *City of Janesville v. Carpenter*, 77 Wis. 288, 301; *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 329.

⁸ See *Aldrich v. Metropolitan, etc., El. Ry. Co.*, 195 Ill. 456.

⁹ *Baltimore, etc., R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Pennsylvania R. R. Co. v. Angel*, *supra*; *Missouri, etc., Ry. Co. of Texas v. Anderson*, 81 S. W. 731 (Tex., Civ. App.).

and the context made it clear that the legatee was not to take beneficially, the bequest failed. *In re Keenan*, 94 N. Y. Supp. 1099.

In withholding the beneficial interest in the legacy from the legatee the decision is undeniably correct.¹ Common justice, at least, would forbid that he should hold beneficially, in the face of the express provision to the contrary in the will, and his own acquiescence in the oral instructions which lay back of the legacy. A trust, then, will be impressed upon the property in his hands, and the only open question is who should be the *cestui*. As to this question there are two well-known theories. One is, that the testator, having in himself the legal and equitable interests in the property, has given only the legal interest to the trustee; that the oral instructions are inoperative, because, without being duly executed in the testamentary form, they purport to dispose of the testator's beneficial interest upon his death; wherefore there is intestacy as to the beneficial interest, which accordingly passes to the next of kin.²

The unsoundness of this doctrine arises from the fact that the testator could not have had, in himself, both the legal and equitable interests as distinct things. For, as an equitable interest is merely a right *in personam* against a trustee, and the deceased could not have had a right of action against himself, he therefore could not have been intestate as to any such right. The full and absolute ownership of the property has, therefore, passed to the legatee. The legatee, however, by his express or tacit assent to the oral instructions of the testator has made a contract which the courts of equity specifically perform by enforcing the trust relation when the legacy vests. The oral instructions cannot be objected to under the Statute of Frauds, as the trust which they declare is one of personalty; nor under the Statute of Wills, since they effect the passage of no property from the testator. They tend simply to prove a personal obligation from a legatee to the orally designated *cestuis que trust*.³ This theory of a contract on the part of the legatee is applicable to any case where the wishes of the testator are communicated to the legatee before he takes, not only when the bequest is on its face qualified but when it is absolute in form.⁴ Even on this point, however, there is some dissent.⁵

RECENT CASES.

ADMIRALTY — TORTS — DIVISION OF DAMAGES BETWEEN TWO TORTFEASORS. — The plaintiff's ship collided with the ship "Caravellas," and the next day with the ship "Haversham Grange." Each inflicted damage upon the plaintiff's ship which made docking necessary, and in the dock both injuries were repaired simultaneously, those caused by the "Haversham Grange" being finished in six, those inflicted by the "Caravellas" in twenty-two days. The plaintiff sued the "Haversham Grange" for three days' dock dues and three days' demurrage. *Held*, that the plaintiff may recover the dock dues, but not

¹ *Taylor v. Plaine*, 31 Md. 158.

² See *Lewin, Trusts*, 11th ed., p. 58; *Olliffe v. Wells*, 130 Mass. 221; *Heidenheimer v. Bauman*, 84 Tex. 174.

³ See 5 HARV. L. REV. 389; *Curdy v. Berton*, 79 Cal. 420; *Cagney v. O'Brian*, 83 Ill. 72.

⁴ *Reech v. Kennegal*, 1 Ves. 123.

⁵ See *Campbell v. Brown*, 129 Mass. 23.

demurrage. *The Haversham Grange*, 21 T. L. R. 628 (Eng., C. A., June 28, 1905).

The question is in what proportion the damages shall be divided between two tortfeasors. It is an English rule of admiralty that if two parties are each obliged to dock a vessel for repairs which are executed simultaneously, the cost of docking must be divided between both parties for the period during which both are at work on the vessel. *Marine Ins. Co. v. China Transpacific S. S. Co.*, 11 App. Cas. 573. Evidently the case at hand falls, as to dockage, directly under this special rule. But no case lays down a similar rule as to demurrage, which question must be settled by the strict logic of legal causation. Where the inevitable consequence of A's tort is a delay of twenty-two days, and B's tort, which occurs subsequently, would have caused a delay of six days, but in fact does not increase the delay already caused, it can scarcely be said that B's tort is a proximate cause of any of the delay, so as to render B liable therefor. Cf. *Kuhn v. Delaware, etc., R. R. Co.*, 99 Hun (N. Y.) 74. Both the upper and the lower court took this view, although it seems hard to reconcile logically with the rule as to dock dues.

BANKS AND BANKING—DEPOSITS—ELECTION OF REMEDIES FOR PAYMENT OF REVOKED CHECK.—A bank paid a check to the payee after payment had been forbidden by the drawer. In an action by the drawer against the bank, evidence showed a former action by the same plaintiff against the payee for the amount of the check. *Held*, that the bank is liable, since the former action was not a ratification of the payment. *Pease & Dwyer Co. v. State National Bank*, 88 S. W. Rep. 172 (Tenn.).

Under the Negotiable Instruments Law adopted in Tennessee revocation of a check before payment destroys any right of the payee in the fund and thus renders the bank liable for subsequent payment, as though no order had been drawn. Although a bailor might sue both the bailee for breach of the bailment and the receiver of the chattel in trover, the absence of a specific chattel renders this case distinguishable. See *Riley v. Albany Savings Bank*, 36 Hun (N. Y.) 513, 522; affirmed in 103 N. Y. 669. The bank's payment may be regarded as the act of a volunteer ratified by suit based upon it. Cf. *Simpson v. Eggington*, 10 Exch. Rep. 845. It has even been said that suing the payee is adoption of the payee as the maker's agent for receiving payment, and hence a defense to the bank. *Riley v. Albany Savings Bank*, *supra*. But the better reason seems to be that, by electing to pursue one of several inconsistent remedies, the plaintiff foregoes the others. *Fowler v. Bowery Savings Bank*, 113 N. Y. 450. Any action by the depositor against the payee is premised upon the bank's nonliability and necessarily is inconsistent with a claim against the bank. But on whatever theory, it seems the former suit should be a bar.

CARRIERS—WHO ARE PASSENGERS—GRATUITOUS CARRIAGE OF EMPLOYEE.—A section hand was injured through the derailment of the work train in which he was riding home from work. *Held*, that he is still an employee, and not a passenger. *Southern Indiana Ry. Co. v. Messick*, 74 N. E. Rep. 1097 (Ind., App. Ct.).

Whether a railway employee occupies the position of a passenger depends on the facts of each case. It is evident that an employee who is on a train in the course of his employment is not a passenger. *Travelers' Insurance Co. v. Austin*, 116 Ga. 264. It is equally evident that an employee who is traveling on business in no way connected with the railroad is for the time being a passenger. *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66. But the present case is one of the confusing middle class in which injuries are received riding to or from work. A simple distinction that will be found to reconcile most of the decisions is that the employee should not be regarded as a passenger when he is using a privilege granted specially to employees as such. Judged by this test, the present decision is sound, for the work train was provided only for employees. On the other hand, a street railway employee riding home on a regular car like any passenger who has a pass is to be considered a passenger. *Peterson v. Seattle Traction Co.*, 23 Wash. 615. For a further discussion of the question presented, see 11 HARV. L. REV. 340; 14 *ibid.* 620; 17 *ibid.* 423.

CARRIERS — WHO ARE PASSENGERS — WHEN RELATION BEGINS. — The plaintiff, desiring to become a passenger of a car, signaled to the motorman, who checked its speed. The plaintiff then attempted to board the car while it was still in motion. *Held*, that he is a passenger while in the act of boarding the car. *Lewis v. Houston Electric Co.*, 88 S. W. Rep. 489 (Tex., Civ. App.).

It is well established that carriers owe the highest care to passengers. It often becomes important, therefore, to determine just when the relation of carrier and passenger begins. The theory is that there must be an offer and an acceptance to a consensual relation, not to a contractual relation, as courts sometimes loosely state, for it is well settled that a carrier owes a public duty independently of contract. See *McNeill v. Railroad Co.*, 135 N. C. 682. Some courts regard the carrier as the offerer and hold that the acceptance is not made until the offeree has actually boarded the car. *Donovan v. Hartford Street Ry. Co.*, 65 Conn. 201. The better opinion supported by the weight of authority, however, considers the signal to the motorman as the offer and the checking of the car as the acceptance. *Brien v. Bennett*, 8 C. & P. 724; *McDonough v. Met. R. R. Co.*, 137 Mass. 210. To hold otherwise would be unfair to the person boarding the car since thereby the highest care would be denied when most needed.

COMPOSITIONS WITH CREDITORS — EFFECT — JOINT DEBTORS. — A and B were makers of a joint note. A being insolvent, his creditors made an oral agreement to take ten shillings on the pound. This amount had never been paid to the holder of the note, who attempted to prove in bankruptcy against B. *Held*, that the promise of A had been taken in satisfaction of any claim against him and that the other joint debtor is thereby discharged. *In re Pearse*, 1905 Vict. L. Rep. 446.

The rule generally laid down is that only a release under seal to one of two joint debtors will release the other. *Line v. Nelson*, 38 N. J. Law 358. Still a seal is not necessary where there is consideration for the release. *Heckman v. Manning*, 4 Col. 543. So it has been held in both England and America that where there has been an accord with one joint debtor and the satisfaction agreed upon has been rendered, the other debtor is discharged, whether the agreement was under seal or not. *In re E. W. A.*, [1901] 2 K. B. 642; *Booth v. Campbell*, 15 Md. 569; but see 15 HARV. L. REV. 491. Several cases have been found in which a composition agreement containing a release under seal has discharged a joint debtor not a party thereto. *Merritt v. Bucknam*, 90 Me. 146. From the facts reported in the case at hand, the court seems to have gone a long way in finding that it was the promise which was taken in satisfaction of the claims. Connecting this with the fact that the agreement was merely oral and that the consideration which supports a composition with creditors is of a very questionable kind, the case illustrates a considerable extension of the original rule.

CONFLICT OF LAWS — CHANGE OF SOVEREIGNTY — LAW GOVERNING IN TERRITORY CEDED BY STATE TO UNITED STATES. — The plaintiff's intestate, while working in the United States Navy Yard in Brooklyn, was killed through the negligence of the defendant. When the state of New York in 1853 ceded jurisdiction over this tract of land to the federal government, a state statute existed allowing an action for causing death; but this was repealed in 1880, and another of a similar nature passed. There had been no legislation by Congress. *Held*, that the defendant is liable. *McCarthy v. Packard Co.*, 105 N. Y. App. Div. 436.

When a state cedes to the United States jurisdiction over territory which is used by the latter for certain public purposes, such as the erection of forts and dock-yards, the laws of the state continue in force in such territory until abrogated or changed by federal legislation. *Chicago, etc., Ry. Co. v. McGlinn*, 114 U. S. 542. Such territory, however, ceases to be a part of the state and becomes a separate unit subject to the exclusive jurisdiction of the federal government. *Cf. Commonwealth v. Clary*, 8 Mass. 72. Hence it follows that the statute passed by the state of New York after the cession did not affect the

law of the ceded territory, but as there had been no legislation by Congress upon this matter the law existing at the time of the transfer was still in force. The defendant therefore was clearly liable. The hesitation of the court to declare whether the Act of 1880 or the earlier law governed was probably due to a former decision of questionable soundness. *Cf. Barrett v. Palmer*, 135 N. Y. 336.

CONFLICT OF LAWS — EXECUTION OF POWER — WHAT LAW DETERMINES SUFFICIENCY OF WILL AS EXECUTION OF POWER. — Testatrix, who had under an English will a testamentary power of appointment over personalty, died domiciled in France, leaving an unattested codicil which was valid by French law and which contained a universal legacy, but made no reference to the power or the property subject thereto. *Held*, that the codicil does not constitute an exercise of the power, § 27 of the Wills Act not applying. *In re Scholefield*, 21 T. L. R. 675 (Eng., Ch. D., July 14, 1905). See NOTES, p. 122.

CONFLICT OF LAWS — JURISDICTION — QUASI IN REM GARNISHMENT OF DEBT OWED BY NON-RESIDENT. — A North Carolina debtor of a North Carolina creditor, while temporarily visiting Maryland, was garnisheed by a Maryland creditor of his obligee. By statute the non-resident debtor had ample opportunity to litigate the claim of the garnishment judgment. *Held*, that, under the "full faith and credit" clause of the Federal Constitution, the Maryland garnishment judgment is a bar against a subsequent action on the original indebtedness in North Carolina. Two justices dissented. *Harris v. Balk*, 198 U. S. 215.

In holding that a debt may be garnisheed wherever the garnishee may be found, the Supreme Court takes the logical step from its previous position that the debt owing to a non-resident may be garnisheed at the domicile of his debtor. *Chicago, etc., Ry. Co. v. Sturm*, 174 U. S. 710. The court finally repudiates the artificial doctrine of the *situs* of a debt, and bases the jurisdiction on the court's control over the garnishee-debtor. The fundamental objection is still unanswered, that the power to discharge the debt, which is the effect of allowing the garnishment judgment as a plea in bar, can be founded only on control over both the debtor and the creditor. See 17 HARV. L. REV. 188. The decision is, however, salutary in settling the deplorable conflict as to the validity of these garnishment proceedings. Further, the Court takes pains to protect the non-resident debtor-creditor by its requirement of due notice from the garnishee, to enable him to contest the claim. There still remains for settlement the diversity as to the materiality of the place for payment of the debt in conferring jurisdiction. Doubtless, the Supreme Court will produce uniformity on the whole subject by sustaining the jurisdiction in all cases. *Cf. Wyeth, etc., Co. v. Lang & Co.*, 127 Mo. 242; *Tootle v. Coleman*, 107 Fed. Rep. 41.

CONFLICT OF LAWS — PERFORMANCE OF CONTRACTS — PROVISION RENDERING INSURANCE POLICY SUBJECT TO FOREIGN LAW. — The defendant, a life insurance company incorporated under the laws of New York, issued a policy in Australia to the plaintiff, providing that he receive an equitable proportion of its surplus at the end of a specified period, and expressed to be "subject to the laws" of the former state. Subsequently the legislature of New York enacted that a decree for an accounting by an insurance company be granted only upon application of the Attorney-General. At the end of the specified period the plaintiff filed a bill in a New South Wales court asking for an account of the proportion of the defendant's surplus due to him. *Held*, that the New York statute is a bar to the plaintiff's bill. *Johnson v. Mutual Life Ins. Co.*, 5 N. S. W. 16.

Where, as in the present decision, the provisions of an insurance policy are admittedly valid under the laws of the place of contracting, an express stipulation that the obligations thereunder shall be defined by the laws of a foreign state, is regularly enforced. *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493; *Mutual Life Ins. Co. v. Hill*, 118 Fed. Rep. 708. The New York court has interpreted the statute in question to affect a change in the law of procedure

only. *Swan v. Mutual, etc., Association*, 155 N. Y. 9. Whether it became a term of the contract depends therefore solely on whether the express provision properly includes a change in procedure as well as in substantive law. According to a principle of the conflict of laws only the rules of substantive law applicable to a contract may differ from the law of the forum. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. Consequently, if this statute is interpreted to be a part of the contract, the plaintiff's only remedy is in New York. The clause in the policy is ambiguous, and if construed most strongly against the insurer, according to the general rule, seems not to include a statutory regulation of procedure restricting the remedy of the insured to a foreign jurisdiction. But aside from the statute the court might properly have denied an account in a controversy concerning the internal management of a foreign corporation. *Clark v. Mutual, etc., Association*, 14 App. D. C. 154.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — CHANGE OF REMEDIES. — A Maryland statute made each shareholder of a trust or banking corporation liable in an action at law to any creditor of the corporation for double the par value of the stock held. A subsequent statute, which changed the remedy to a bill in equity by all the creditors against all the shareholders, was made retroactive in effect so as to abate all actions at law then pending. *Held*, that the statute is unconstitutional. *Myers v. Knickerbocker Trust Co.*, 139 Fed. Rep. 111 (C. C. A., Third Circ.).

Though the Court of Appeals of Maryland recognized that the statutory liability of shareholders to creditors of a corporation is contractual in its nature, yet it decided that the statute here involved did not impair the obligation of contracts. *Miners' & Merchants' Bank v. Snyder*, 59 Atl. Rep. 707. A distinction was early taken between the obligation of a contract and the remedy to enforce the obligation. See *Sturges v. Crowningshield*, 4 Wheat. (U. S.) 122, 200. From this, some courts inferred that the remedy could be changed at will or absolutely withdrawn. See *Read v. Frankfort Bank*, 23 Me. 318, 321. But the federal courts, followed by the decided weight of authority, take the position that the remedy existing when the contract was made is part of the obligation. *Edwards v. Kearzey*, 96 U. S. 595. Clearly, therefore, all remedy cannot be taken away. See *Call v. Hagger*, 8 Mass. 423, 430. The state may, however, alter the form of the remedy or limit the time for its application. *Paschall v. Whitsett*, 11 Ala. 472, 478. It may likewise provide a new or more effective remedy, as this could in no way impair the obligation. But in professing to change merely the remedy the state must not impair rights accruing under the contract; and the substituted remedy must be substantially as effective as before. *Western Nat. Bank of New York v. Reckless*, 96 Fed. Rep. 70. In the case under consideration the obligation seems clearly impaired.

CONSTITUTIONAL LAW — VESTED RIGHTS — LEGISLATIVE AUTHORIZATION OF NUISANCES. — The defendant railroad located its main line, together with a freight yard and depot, near enough to the plaintiff's premises to cause her serious inconvenience and discomfort. *Held*, that the plaintiff may recover for such injury, although the value of her land and buildings has not been diminished. *St. Louis, etc., Ry. Co. v. Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). See NOTES, p. 127.

CONTRACTS — CONSTRUCTION — IMPLIED PROMISE TO USE DILIGENCE IN FORWARDING TO COMMISSION AGENT. — A company engaged the plaintiff to sell goods for it on commission, but was so negligent in not delivering on time, that the plaintiff failed to earn many commissions he otherwise might have obtained. For this the plaintiff brought action. *Held*, that he cannot recover, since no promise to use due diligence can be implied from the contract to employ. *Byrns v. United Telferage Co.*, 105 N. Y. App. Div. 69.

The general rule is that a promise will be implied whenever it is necessary to give to the transaction the effect which both parties intended. *Ogdens, Ltd. v. Nelson*, [1903] 2 K. B. 287. On this principle, where a doctor sold his practice in consideration for a part of the future profits, the court implied a promise by the vendee "to take common and ordinary care to carry on the business so

as to realize receipts"; and the vendee was held liable for going out of practice. *M'Intyre v. Belcher*, 14 C. B. (N. S.) 654. Similarly a contract to employ a commission agent has been held to include an implied promise to furnish goods. *Turner v. Goldsmith*, [1891] 1 Q. B. 544. If, then, the company had entirely stopped sending goods, it would have been liable. But, so far as the parties are concerned, the effect of not sending any goods is equivalent to that of sending them so late that no one will buy. In each case, the plaintiff loses commissions through the default of the defendant; and in each, the original agreement is shorn of "the effect which both parties intended." It would seem, therefore, that a clearer instance of an implied promise could hardly be found.

CONTRACTS — DEFENSES — IMPOSSIBILITY BY DOMESTIC LAW. — A lessee covenanted to pay certain rent and to use the demised premises for no purpose except that of a saloon. At the time the lease was executed a law was in force by which any county might adopt prohibition by popular vote. Before the term began, but after the lease was executed and delivered, the county, in which the demised premises were, did so adopt prohibition and thereby rendered it impossible to use the premises for a saloon. *Held*, that the lessee is not absolved by such impossibility from either covenant. *Houston Ice, etc., Co. v. Keenan*, 88 S. W. Rep. 197 (Tex., Sup. Ct.).

The court treats an impossibility created by the application of domestic law as analogous to a supervening impossibility of fact, and to determine whether performance should be excused applies the test of ability to foresee. For a discussion of the principles involved, see NOTES, 18 HARV. L. REV. 384.

COPYRIGHT — INFRINGEMENT — MUSICAL COMPOSITION. — The plaintiff brought suit to restrain the infringement of copyrights of two songs, which the defendant company had reproduced and sold in the form of perforated records, designed for use with mechanism to play the compositions on a musical instrument. *Held*, that a musical composition is not subject to copyright, but only its material embodiment in the form of a writing or print, and that the perforated sheet is not an infringement of such copyright. *White-Smith Pub. Co. v. Apollo Co.*, 139 Fed. Rep. 427 (Circ. Ct., S. D., N. Y.).

At common law, the owner of an unpublished composition has an absolute property therein, but this right is lost on publishing. *DRONE, COPYRIGHTS* 102, 116. Congress has power to secure "for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." U. S. Const., Art. I, § 8. The term "writings" includes all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. *Lithographic Co. v. Sarony*, 11 U. S. 53. The musical conception, then, as an idea, is not subject to copyright. *Dilson Co. v. Littleton*, 67 Fed. Rep. 905. At the time of publishing the composition, a statutory copyright may be acquired, which gives the proprietor of any musical composition the exclusive liberty of copying and vending the same. U. S. Comp. St. 1901, § 4952. A copy is "that which comes so near to the original as to give every person seeing it the idea created by the original." *West v. Francis*, 5 Ban. & A. 737, 743. The perforated roll does not suggest the original to the eye, but is a mere part of the mechanism intended to produce the sound of the melody. The decision reached by the court is logical, and is supported both in England and in this country. *Boosey v. Whight*, [1900] 1 Ch. 122; *Kennedy v. McTammany*, 33 Fed. Rep. 584.

CORPORATIONS — FOREIGN CORPORATIONS — CONDITIONS UPON RIGHT TO DO BUSINESS: WHETHER COMPLIANCE CREATES A NEW CORPORATION. — A Kentucky statute required that no foreign railroad corporation should operate within the state until it should have become a corporation of the state, and provided that it might become incorporated by filing a copy of its charter, and that "thereupon . . . such company . . . shall at once become and be a corporation, citizen, and resident of this state." A foreign railway company complied with the statute, but, as a foreign corporation, paid a corporation franchise tax. *Held*, that the railway is not liable to pay a second franchise tax,

since it has not become a separate domestic corporation. *Commonwealth v. Chesapeake, etc., R. R. Co.*, 27 Ky. Law Rep. 1084.

A state's right to dictate the conditions upon which a foreign corporation may do business enables it to require reincorporation as a domestic corporation. Whether compliance amounts to more than a license to the foreign corporation is a question of legislative intent, but statutes in substantially the same language have been generally construed as creating within the state a second distinct corporate entity. *Debnam v. Southern, etc., Tel. Co.*, 126 N. C. 831. The present decision escapes some of the curious anomalies which follow the general view. See 13 HARV. L. REV. 597. But it would seem that an equally just result might have been reached, avoiding double taxation, through a more obvious construction of the statute: that as a condition precedent to entering Kentucky, the foreign corporation formed a new domestic corporation which was taxable; that the old corporation, not doing business in the state, was not taxable; and that not the second tax, but the first, was void. The case seems distinguishable from a late decision of this court holding that such a corporation as the defendant is not within a statute levying an organization tax. *Cf. Cincinnati, etc., Ry. Co. v. Commonwealth*, 26 Ky. Law Rep. 1106.

DOMICILE — GOVERNMENT OFFICIAL AT WASHINGTON. — On a petition for divorce, it appeared that the petitioner had left Tennessee with his family in 1882. Since that time he had lived in Washington, where he held a civil service position in the Treasury Department. He had made three short trips to Tennessee, and had voted there at those times. He testified that it had always been his intention to return to Tennessee if he should lose his position. Section 4203 of the Code provides that a divorce may be granted where the petitioner has resided in the state for the two years next preceding the filing of the petition. *Held*, that the petitioner has lost his domicile in Tennessee, and the court is without jurisdiction. *Sparks v. Sparks*, 88 S. W. Rep. 173 (Tenn.).

Divorce is regulated by the law of the domicile of the parties. *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. Residence as used for the purposes of divorce is equivalent to domicile. *Shaw v. Shaw*, 98 Mass. 158. Domicile means a person's legal home. It requires both the *animus* and the *factum*. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307. The intention is itself a question of fact, to be determined by evidence, the declarations of the party not being conclusive. *In re Craignish*, [1892] 3 Ch. 180. In England an intention to remain permanently is necessary. *Bell v. Kennedy, supra*. In the United States a less settled intention will be sufficient, as, for instance, to remain while one is working in a town, or while a student, provided the person has no other home. *Wilbraham v. Ludlow*, 99 Mass. 587; *Putnam v. Johnson*, 10 Mass. 488. The Tennessee court seems to have considered that the acquisition of an actual home in Washington with the intention of remaining there for an indefinite time counterbalanced declarations of intention to return to Tennessee upon the happening of an uncertain future event. *Cf. Moor v. Harvey*, 128 Mass. 219. The result seems consistent with the general conception of this subject held by the American courts.

ELECTIONS — DISCRIMINATION IN FORM OF BALLOT. — A statute provided that squares be printed opposite the names of parties on the official ballot, and that citizens who so desired might vote a straight ticket by marking a single cross. *Held*, that this provision does not impair the freedom and equality of elections. *Oughton v. Black*, 61 Atl. Rep. 346 (Pa.).

A difference in the labor of preparing a ballot is not conclusive of real impairment of the constitutional principle of freedom and equality of elections. See *Todd v. Election Commissioners*, 104 Mich. 474. Since the ballot must be limited in size, a statute that restricts representation on it to parties that received a certain percentage of the vote at the last election is reasonable so long as the voter may insert other names at will. *Plimmer v. Poston*, 58 Oh. St. 620. But if he is confined to the printed names, the better view is that his freedom of choice is impaired. *Lamar v. Dillon*, 32 Fla. 545. A law that names of candidates nominated by two parties be printed but once on the ballot

is sound, although the voter may be inconvenienced thereby. *Runge v. Anderson*, 100 Wis. 523. A statute like that in the present case has been upheld. *Ritchie v. Richards*, 14 Utah 345. But one with an added proviso invalidating ballots containing other marks was declared unconstitutional as tending to disfranchisement, since a cross opposite the name of a party that had nominees for less than the full number of offices would cast no vote for the others, and an attempt to fill in the blanks would invalidate the whole ballot. *Eaton v. Brown*, 96 Cal. 371. These illustrations go to show that mere inconvenience is not impairment, and fully support the reasoning of the decision under consideration.

ESTOPPEL — PARTIES ESTOPPED — ESTOPPEL AGAINST STATE AND UNITED STATES. — In accordance with an established custom, but under a misconstruction of law, accounts of a marshal, covering certain services rendered by his deputies, were approved by the court to which they had been presented at intervals during his term of service, and were allowed by the proper officials of the Treasury Department. The money was paid by the government with knowledge that the greater part of it would be paid over by the marshal to his deputies. In an action by him, five years after his retirement from office, during which time the government had made no complaint of these payments to him, it set them up as a counterclaim. *Held*, that it is estopped. *Walker v. United States*, 139 Fed. Rep. 409 (Circ. Ct., M. D., Ala.). See NOTES, p. 126.

EVIDENCE — DOCUMENTS — CARBON COPIES AS DUPLICATE ORIGINALS. — *Semble*, that in an action of assumpsit against a carrier for loss of goods, a carbon copy of the letter sent to the carrier notifying it of the loss is admissible as a duplicate original. *Chesapeake & Ohio Ry. Co. v. Stock & Sons*, 51 S. E. Rep. 161 (Va.). See NOTES, p. 123.

EVIDENCE — DOCUMENTS — RECITAL IN ANCIENT DEED NOT ADMISSIBLE TO PROVE RELATIONSHIP. — An ancient deed reciting that the grantors were heirs of a former owner was offered as evidence of such fact. There was no proof that possession of the premises had been held under the deed. *Held*, that the evidence is not admissible. *Lanier v. Hebard*, 51 S. E. Rep. 632 (Ga.).

Ancient deeds have been admitted in some jurisdictions as evidence of a relationship therein recited, though the courts have differed as to the requirement of possession under them as a condition precedent to their admission. *Deery v. Cray*, 5 Wall. (U. S.) 795; *Scharff v. Keener*, 64 Pa. St. 376; *contra*, *Fort v. Clarke*, 1 Russ. 601. Although the court in the principal case might have excluded the evidence on the sole ground that possession had not been shown, yet it went further and intimated that even if possession had been shown the evidence would not have been admitted. This position seems sound. Recitals of relationship in a recent deed are generally held inadmissible. *Costello v. Burke*, 63 Ia. 361. There would appear no reason for a different rule in the case of ancient deeds. The fact of ancientness should be effective merely to authenticate the instrument, and should not remove the necessity of complying with the requirements of the pedigree rule. It is to be observed that in most of the cases where the evidence has been received this rule has not been infringed. *Cf. Fulkerson v. Holmes*, 117 U. S. 389.

EXECUTORS AND ADMINISTRATORS — RIGHTS — EXERCISE OF RIGHT OF RETAINER AGAINST JUDGMENT CREDITOR. — The plaintiff, in a suit upon a debt, recovered judgment *de bonis testatoris* against the defendant, who was the executrix under a will. The defendant herself was owed a debt by the testator, but did not plead *plene administravit* or a right of retainer. Later the plaintiff obtained an order for the administration of the testator's estate, which proved to be insolvent. The defendant thus claimed to be entitled to exercise her right of retainer against the plaintiff. *Held*, that she cannot do so. *In re Marvin*, 21 T. L. R. 765 (Eng., Ch. D., Aug. 10, 1905).

The common law right of an executor to retain from the assets of the estate in priority to other creditors of equal degree an amount owed him by the testator, though abolished or modified by statute in about all the states of this coun-

try, still obtains in England. *In re May*, 45 Ch. D. 499. Furthermore this right is not destroyed by a decree for the administration of the estate. *Nunn v. Barlow*, 1 Sim. & St. 588. A judgment, however, recovered by a creditor against an executor who does not plead *plene administravit* or a similar plea alleging insufficiency of assets, is conclusive upon him that he has assets to satisfy such judgment. *Kansden v. Jackson*, 1 Atk. 292. From this it would seem to follow that he could not later assert his right of retainer to the prejudice of this creditor. See *In re Hubback*, 29 Ch. D. 934, 941. There would appear no reason, however, why he should not retain against other creditors. Cf. *Wilson v. Coxwell*, 23 Ch. D. 764. But since the loss of his right to retain against the judgment creditor is due to the executor's own fault, it would seem that he should bear the burden of this loss and retain from the other creditors only the amount by which their dividends would have been diminished had he pleaded properly.

JUDGMENTS — FOREIGN JUDGMENTS — ENFORCEMENT OF DORMANT JUDGMENT IN SISTER STATE. — A judgment was obtained against the testator in Kansas. In an action thereon brought in Rhode Island against his executor, the defendant pleaded that the testator had died more than one year previous, and that the action was therefore barred under Gen. Stat. Kan. 1901, § 4883. Held, that in an action on a judgment of a sister state the *lex fori* governs rather than the *lex loci*, and that the plaintiff may accordingly recover. *First National Bank v. Hazie*, 61 Atl. Rep. 171 (R. I.).

A state has power to prescribe the remedies which it will allow within its jurisdiction. The statute of limitations is held to affect the remedy and not the right, and the *lex fori* will in general prevail. *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312. But when a judgment is barred in the jurisdiction where obtained, the rule is somewhat doubtful, though unquestionably a state may allow an action in such a case. *Miller v. Brenham*, 68 N. Y. 83. Nevertheless, as the whole question is one founded on public policy, the better opinion, which is supported by the weight of authority, would appear to sustain the view that an action on a judgment barred by the laws of the state of its promulgation should not be allowed in another state, as it would seem a mere gratuity for a sister state to give it greater efficacy than its home tribunal. *St. Louis, etc., Co. v. Jackson*, 128 Mo. 119. A judgment barred by special statute applying to personal representatives of a decedent, as in the case at hand, is a dormant judgment equally with one barred by general statute. *Mawhinney v. Doane*, 40 Kan. 676. The result reached by the court may be supported, however, on the alternative holding that the plea did not bring the right of action within the Kansas limitation.

JUDGMENTS — FOREIGN JUDGMENTS — RIGHT OF FOREIGN CORPORATION TO SUE. — The plaintiff, a foreign corporation, recovered judgment in Missouri on a contract made in Texas and sought to enforce that judgment in the latter state. The defendant alleged that the plaintiff at the time of the contract had not applied for or else had forfeited his permit to do business in Texas and hence could not sue there upon the judgment, since it was a demand arising out of the contract within the provisions of Rev. Civ. St. 1895, arts. 745, 746. Held, that if such facts concerning the permit are proved, the plaintiff cannot recover on the judgment. *St. Louis, etc., Co. v. Beilharz*, 88 S. W. Rep. 512 (Tex., Civ. App.).

It has been said in a case cited as a precedent for this decision that before enforcing a sister-state judgment under the "full faith and credit" clause of the Federal Constitution (Art. 4, § 1) a court may ascertain whether the claim upon which it is based is such a one as that court has jurisdiction to enforce. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. This rule has already been practically confined to penal judgments, which are distinguishable upon the ground that the real plaintiff is not a citizen but the foreign state itself, and judgments in favor of citizens alone are entitled to extra-territorial recognition. See *Huntington v. Attrill*, 146 U. S. 657. Since a corporation, also, is not a citizen, within U. S. Const., Art. 4, § 2, a state may as it sees fit refuse to entertain its suits. *Anglo-*

American Prov. Co. v. Davis Prov. Co., No. 1, 191 U. S. 373; see also 17 HARV. L. REV. 417. Upon the basis of this right the principal case can be supported if the judgment can be said to be a demand arising out of the contract, upon which the Texas statute forbids a foreign corporation to sue.

LARCENY — CONSENT — AGENT. — The prisoner was by agreement allowed to take from the prosecutor's pile of ashes as much as he wanted at a certain price per ton, upon the understanding that the amount taken should be weighed by the prosecutor's agent, who was to enter the weight in a record book. The weigher in collusion with the prisoner entered in the book a ton and a half less than was weighed out. *Held*, that the prisoner is guilty of larceny of the ton and a half. *Rex v. Tideswell*, [1905] 2 K. B. 273.

As the court points out, the title had not passed to the prisoner before the entry in the book, because the weigher and the prisoner were conspirators against the prosecutor, and therefore the weigher lost his power as agent to transfer title to the prisoner. *Regina v. Hornby*, 1 C. & K. 305. This violation of the owner's possession was without his consent. True, at the time of his agreement with the prisoner he consented to the latter's taking what he might need, but this consent was given only upon condition that the ashes be weighed and the correct weight entered in the book. In the nature of things consent to a present taking cannot be upon condition, yet consent to a future taking may be. If the condition is unfulfilled, the taking is without consent and is therefore larceny. *Carrier's Case*, Y. B. 13 Edw. IV. 9, pl. 5. As larceny must be of specific property, it would seem that the conviction for the ton and a half can best be supported by proof of the larceny of the total amount taken. See *State v. Martin*, 82 N. C. 672.

MUNICIPAL CORPORATIONS — CONTRACTS — PATENTED ARTICLES. — The defendant advertised for bids for making street improvements, specifying that a patented pavement would be required and stating that the patentees had agreed with the city to sell to any bidder, at a certain price, the necessary materials therefor. A bill was filed to enjoin the letting of the contract on the ground that such a specification was in contravention of the statute requiring contracts for street improvements to be let to the best and lowest bidder. *Held*, that the defendant has no power to make such a specification. *Monaghan v. City of Indianapolis*, 75 N. E. Rep. 33 (Ind., Ct. App.).

The objection to the proposed contract was that it required the use of an article subject to a monopoly, while the statute called for competitive bidding. Had the specifications simply required the use of materials already in the possession of the city, obtained in the open market, no objection would have arisen. The decision is a perfectly logical result of a literal interpretation of the statute, but it is opposed to the prevailing and preferable rule that the city may make contracts like the one here contemplated. *Hobart v. The City of Detroit*, 17 Mich. 246; *contra*, *Dean v. Charlton*, 23 Wis. 590. The basis of the prevailing doctrine is that it was not the intention of the legislature, which gave the city power to make improvements, to prevent it from using patented articles when they should be desirable and beneficial. The rule laid down in the case under consideration has not proven satisfactory where longest in use. See Wis., P. & L. Laws, 1869, c. 316, § 2; *Kilvington v. The City of Superior*, 83 Wis. 222.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — RECOVERY BY MUNICIPALITY AGAINST NEGLIGENT CONTRACTOR. — The defendant company gave its bond to perform the provisions of an ordinance requiring it to save and keep the city fully indemnified from all damages that might occur from any of the company's acts. The city sued the defendant in tort for the amount of a judgment rendered against the city for a defect in a street, caused by the defendant's negligence. *Held*, that the city may not recover in tort, but must seek its remedy on the bond, which defines and limits its rights. *City of Pawtucket v. Pawtucket Electric Co.*, 61 Atl. Rep. 48 (R. I.).

In a case like this the defendant would, in the absence of a bond, be answerable to the municipality in tort. *City of Rochester v. Montgomery*, 72 N. Y.

65. Whether or not the bond should bar the plaintiff from such form of action must depend upon the intention of the parties as expressed therein. The presumption is that the bond is simply a collateral remedy, giving the municipality a greater security up to a certain amount, yet not waiving its right to recover in excess of that amount. Under such circumstances it seems that the agreement should not be construed as exclusive of the common law rights of the plaintiff unless such construction is necessitated by its clear import or by necessary conclusion from its terms. Such an interpretation would be in accordance with the analogy of statutes, which are construed strictly when they tend to alter the common law. *Cf. Shaw v. Railroad Co.*, 101 U. S. 557.

NEGLIGENCE — DEFENSES — EFFECT OF A CRIMINAL STATUTE ON THE DEFENSE OF ASSUMED RISK. — The plaintiff, a servant, brought action against his master, for injuries caused by the unguarded condition of the latter's machinery. The defendant pleaded that his servant had full knowledge and assumed the risk. The plaintiff demurred to the plea. *Held*, that the demurrer must be sustained, on the ground that the defendant had failed to comply with a criminal statute making it a misdemeanor not to guard machinery of this character. One justice dissented. *Hall v. West and Slade Mill Co.*, 81 Pac. Rep. 915 (Wash.).

By the common law, in occupations attended with unusual danger the master is bound to use all reasonably obtainable appliances for the prevention of accidents. *Mather v. Rillston*, 15 Sup. Ct. Rep. 464. But a servant who knows of the defective condition of the premises and continues to work thereon, is barred by contributory negligence from recovery for injuries caused by such defect. *Lewis v. New York, etc., R. R. Co.*, 153 Mass. 73. In general a statute will not be construed to alter the common law unless it appears that such was the intention. *Langlois v. Dunn Worsted Mills*, 25 R. I. 645. The legislature, in a number of similar statutes, has deemed it necessary expressly to cut off the defense of assumed risk, as pointed out by the dissenting opinion. The statute in the case at hand is criminal in form, and has no such provision. Wash., Laws 1903, c. 37. In the absence of express provision, or of clearly expressed intent, the better opinion seems against giving to such statutes an interpretation which destroys the defense of assumed risk. *Knisley v. Pratt*, 148 N. Y. 372; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135.

PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — ASSUMPTION OF DEBTS BY CONTINUING PARTNER. — *Held*, that a creditor of a partnership, having notice of its dissolution and of the continuance of the business by one partner who assumes the firm debts, must sue the continuing partner alone and exhaust the partnership assets in his hands before he is entitled to a judgment against the partners jointly. *Morrissey v. Berman*, 94 N. Y. Supp. 596.

The result here reached seems clearly wrong on the following grounds: the proposition that a creditor of a solvent partnership must have recourse to the firm property before he can reach the individual property of the partners is without foundation, the separate estates of the partners being liable in the first instance. LINDLEY, PARTNERSHIP, 7th ed., 229; *Stevens v. Perry*, 113 Mass. 380. Though by the arrangement between the partners the retiring partner becomes surety for the other, a surety may be sued upon default of his principal before any action is taken against the principal. *Penny v. Crane Brothers Mfg. Co.*, 80 Ill. 244. Furthermore, there being no novation, the creditor's right to sue both original debtors cannot be altered by an agreement between the debtors alone.

POWERS — EFFECT OF APPOINTMENT TO REMAINDERMAN. — By a will probated in 1869, a testator left an estate in trust for his daughter for life, remainder to her heirs, subject however to a power given to the daughter to appoint the remainder in fee among her heirs and collateral relatives. This daughter died in 1904, leaving a will in which she exercised her power in favor of her daughter who was her only heir and was alive at the time of the testator's death. *Held*, that the granddaughter takes under the will of 1869, and not under the

power of appointment, and that a transfer tax established in 1897 can not be imposed upon the property. *In the Matter of Lansing*, 182 N. Y. 238.

The position taken by the court, that the appointee can elect either to take under the appointment or to retain the estate which by the law of New York vested in her on the death of her grandfather, seems untenable. The legal condition imposed by the will of the grandfather, which should divest the heir of her estate, has happened. To hold that she can determine whether or not it shall have any effect, is virtually to deny that it is a legal condition. A possible explanation of the decision is that, since the appointment operates to give the appointee substantially the same estate which she would have had in default of any exercise of the power, it is void. However, this theory has been properly repudiated. *Sweetapple v. Horlock*, 11 Ch. Div. 745. The appointment has all the necessary formal elements; and that it does not change the *quantum* of the appointee's estate, seems no sufficient reason for holding it invalid. For a discussion of another aspect of the case, see NOTES, p. 122.

RAILROADS — RAILROAD CROSSINGS — DUTY TO WHISTLE ON APPROACHING CROSSING. — The trial court charged that it was negligence, as a matter of law, for the defendant's engineer to fail to give warning of the train's approach to a bridge under which ran a highway. The defendant excepted. *Held*, that the instruction is erroneous, since the question of the defendant's negligence is for the jury. *Louisville & N. R. Co. v. Sawyer*, 86 S. W. Rep. 386 (Tenn.).

In almost all jurisdictions in this country, there are statutes requiring that some warning of a train's approach to a grade-crossing be given. And even where no such statute exists there is authority that failure to give warning is negligence *per se*. See *Favor v. Boston, etc., Corporation*, 114 Mass. 350; *contra, Ellis v. Great Western Ry. Co.*, L. R. 9 C. P. 551. In the present case, though recognizing that there may be such a duty in regard to crossings at grade, the court nevertheless refuses to extend it to non-grade crossings. *Cf. Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259. This decision seems correct. The danger incident to the failure to give warning of an approaching train is so much greater in the case of a grade than in that of a non-grade crossing that there is little justification for applying the strict rule in the latter case. Furthermore, this distinction between the two kinds of crossings has been recognized in those decisions which hold that a statute requiring a warning to be given by trains before reaching crossings does not apply to non-grade crossings. *Cf. Jensen v. Chicago, etc., R. R. Co.*, 86 Wis. 589.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — AGREEMENTS CONCERNING COPYRIGHTS AND PATENTS. — Publishers formed an association the members of which agreed to sell copyrighted books only to those jobbers and booksellers who would maintain the net prices fixed by the individual members of the combination. *Semble*, that the combination is illegal as violating the Sherman Anti-trust Law. *Bobbs-Merrill Co. v. Straus*, 139 Fed. Rep. 155 (Circ. Ct., S. D. N. Y.). See NOTES, p. 125.

RESTRICTIONS AS TO THE USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS: WHO MAY ENFORCE. — The legislature of Massachusetts in 1861 granted to the Massachusetts Institute of Technology a block of land in the city of Boston with the restriction that it should not "cover with its buildings more than one-third of the area granted." The surrounding lots fronting on this square were subsequently sold by the state for prices considerably influenced by the fact that the lots faced this partially open square. No mention of the restriction was made in the deeds to the purchasers. In 1903 the legislature authorized the Institute of Technology to build over their entire block. A bill for an injunction was filed by a sub-purchaser of one of the lots sold by the state to enforce the original stipulation. *Held*, that the injunction be issued. *Wilson v. Massachusetts Institute of Technology*, 75 N. E. Rep. 128 (Mass.).

The real point at issue in this case was as to whether this restriction was imposed for the benefit of the neighboring land or for the advantage of the

state. The fact that the state itself was the original grantor would be an element tending to support the latter view. The decision, therefore, exemplifies in an emphatic manner the inclination of courts to regard such restrictions as made for the benefit of the neighboring land. For a further discussion of the principles involved, see 18 HARV. L. REV. 535.

TRADE-MARKS AND TRADE-NAMES — THE RIGHT TO TRADE IN ONE'S OWN NAME — TRADING ON ANOTHER'S REPUTATION. — The parties dissolved their partnership in "The Simon Auction Co." The old business was continued under a new name by the plaintiff, who tried to enjoin the defendant, though the latter was now engaged in a different kind of business, from using the old name. *Held*, that the plaintiff is not entitled to the injunction, since the defendant is not using the name so as to mislead the public or defraud the plaintiff of any trade to which he is entitled. *Blanchard Co. v. Simon*, 51 S. E. Rep. 222 (Va.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

TRUSTS — CONSTRUCTIVE TRUSTS — FORGED TRANSFER OF STOCKS. — The defendant company was induced to transfer the plaintiff's registered bonds to bearer through a resolution of the latter's board of directors and a power of attorney, both forged by its delinquent treasurer. The power of attorney was witnessed by the other defendant, a member of the New York Stock Exchange, as required by the rules of that body, making such endorsement "a guarantee of the correctness of the signature of the party in whose name the stock stands," and was forwarded by him with the certificates to the defendant company. The plaintiff now brings suit for the bonds, and the defendant company seeks indemnity against the broker. *Held*, that the plaintiff can recover, and the defendant company is entitled to indemnity. *Clarkson Home v. Missouri, etc., Ry. Co.*, 182 N. Y. 47.

The defendant innocently presented a forged transfer-deed of stock and received from the plaintiff company new certificates which were in turn transferred to a *bona fide* purchaser. When the forgery was later discovered, the plaintiff was forced to issue equivalent stock to the true owner and now seeks indemnity from the defendant. Neither party was negligent. *Held*, that the defendant is liable. *Corporation of Sheffield v. Barclay*, 93 L. T. 83 (Eng., H. of L., July, 1905).

The House of Lords now reverses the judgment of the Court of Appeals and reinstates that of Lord Alverstone which was noticed in 16 HARV. L. REV. 228. For a full discussion of the subject see two articles in 17 *ibid.* 373 and 543. The New York decision, which is a case of first impression in that jurisdiction, might well have been rested on the broader grounds enunciated in the latter article.

TRUSTS — CREATION AND VALIDITY — WHETHER BEQUEST ON SECRET UNDERSTANDING CREATES A TRUST. — A testator bequeathed to J. D. two legacies; one "to be expended by him, as I have instructed him during my lifetime"; the other, "for his personal use." *Held*, that the first bequest is invalid, as an unsuccessful attempt to create a trust. *In re Keenan*, 94 N. Y. Supp. 1099. See NOTES, p. 128.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

FEDERAL SUPERVISION OF INSURANCE. — A new subject for the application of the power of Congress to regulate interstate commerce is suggested by the recommendation of a federal statute regulating insurance, which was made by a special committee at the last meeting of the American Bar Association. *Report of the Committee on Insurance Law*.¹ Four of the committee's five members joined in the majority opinion, while the fifth presented a minority report. Neither report was acted upon by the association, but a resolution declaring the opinion that federal control of insurance would be unconstitutional was referred to the Committee on Insurance Law for the present year.

The members of the committee, while unanimous in the opinion that Congressional regulation is desirable and practicable, disagree upon the question of its constitutionality. The majority report maintains that the past decisions of the United States Supreme Court do not exclude the business of insurance from the definition of "commerce," and intimates that Congress itself has the exclusive power to determine what articles are the subjects of interstate commerce within the meaning of the constitutional provision. The minority opinion denies both these propositions, and insists that federal supervision is impossible without a constitutional amendment.

The statement that Congress has authority to define the limits of its power to regulate interstate commerce, which is at least startling, suggests an examination of the authorities upon which it purports to be based. The majority rely upon isolated sentences quoted from decisions which denied to a state the power to exclude from its boundaries intoxicating liquors in the original packages. The language of these cases is clearly shown by the context to mean that Congress, as against the asserted police power of a state, has authority to determine whether commodities which are admittedly in fact subjects of commerce within the meaning of the constitutional clause, shall be lawful articles of commerce. Further support for the committee's position is sought in the famous case of *McCulloch v. Maryland* (4 Wheat. [U. S.] 316). This decision, however, was simply to the effect that Congress has the implied power to charter a national bank as an appropriate means to the execution of its admitted fiscal powers; and the opinion contains no intimation that Congress has authority to define the limits of the great substantive and independent powers, to which the power of choosing appropriate means of execution was held to be annexed as an incident. The authorities cited do not deny that the meaning of the term "commerce" in the constitutional phrase is a question of the interpretation of a written instrument which is to be made by judicial decision, and not by legislative fiat.

The majority's contention, that past decisions furnish no obstacle to federal regulation of insurance, is true only to the extent that the Supreme Court has never passed upon the validity of an act of Congress regulating insurance. It has, however, frequently held constitutional state statutes which totally exclude foreign insurance companies from doing business within state territory except upon condition that they obtain a license from the state or pay a tax upon the amount of premiums secured in the state. *Paul v. Virginia*, 8 Wall. (U. S.) 168, 183; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 573. The contention that these decisions have not excluded insurance from the definition of "commerce" cannot be supported except upon the assumption that the statutes affected only matters local and limited in their nature, which state legislatures may regulate in the absence of legislation by Congress. But the

¹ Published in pamphlet form by the American Bar Association, Baltimore.

opinions, so far from being rested upon this narrow ground, have specifically stated that insurance is not "commerce" within the meaning of the constitutional provision. Furthermore, if insurance were "commerce," state statutes exacting a tax or license from foreign insurance companies as conditions precedent to their doing business within the state, could not be sustained consistently with the line of decisions which hold invalid identical statutes concerning express companies and railroads. Cf. *Crutcher v. Kentucky*, 141 U. S. 47; *Hooper v. California*, 155 U. S. 648, 653; *Nutting v. Massachusetts*, 183 U. S. 553, 556. In each class of cases the state is not legislating concerning merely local subjects, but is interfering directly with the freedom of interstate business; in each the interference is sought to be justified by the right to exercise police powers. The only valid distinction between the two classes of statutes is that one does, and the other does not, attempt to regulate "commerce." The recent decision concerning lottery tickets, which is cited in the majority report holds, not that lottery companies are engaged in "commerce," but that the carrying of lottery tickets by an express company is commerce. *Lottery Case*, 188 U. S. 321, 354. This opinion, from which four justices dissented, can hardly be said to have weakened the authority of the earlier cases recognizing the power of a state to regulate insurance. A reversal of these decisions could be justified only upon the ground that a radical change in the nature of the business of insurance has occurred since they were rendered; and on principle it seems difficult to distinguish the present business of insurance from that of the negotiation of any contract by mail between parties residing in different states.

DISHONOR OF A CERTIFIED CHECK. — It is common belief that a bank is under an absolute obligation to pay a check certified at the instance of the payee as long as the check remains in his possession, and that the payee, questions of forgery aside, has an irrevocable right to compel payment, irrespective of the circumstances under which he procured the check. MORSE, BANKS AND BANKING, 4th ed., § 414. While admitting this as a general principle, a late article by an anonymous writer suggests that the bank, under certain circumstances, is justified in refusing to honor the check. *Stopping Payment of a Certified Check*, 22 Bank. L. J. 411 (June, 1905). It is, of course, assumed that the check has not reached the hands of a *bona fide* purchaser for value. The author points out that a certified check is analogous to a promissory note of the bank, and that a bank does right in refusing to pay its bank note held by a thief. *Olmstead v. Bank*, 32 Conn. 278. Therefore, under like conditions, it should also be protected in its refusal to pay a certified check; and it is contended that the same power should exist when the bank has notice that the check was obtained by the payee through fraud on the maker, or as payment for an illegal transaction, such as gambling, in which both maker and payee were concerned.

Though the writer does not support his view by any theoretical discussion, his result appears to be substantially correct. On certification the practice is for the bank to debit immediately the amount of the check to the maker's account, and credit its "certified check account," which is in turn debited with the check on payment. The drawer being thus effectually deprived of all control over that amount of his earlier credit, a novation arises, by which the bank promises the drawer to pay the payee, in consideration of the drawer's giving up all claim on it. As the act of certification is merely a short cut for actual payment by the bank of the amount of the check, and its redeposit by the payee, the payee, as consideration for the bank's promise, accepts the extinction of the check and allows the money to remain on deposit. Finally, the novation is completed by the payee's promise to accept the bank as debtor in the drawer's place, for which the latter promises to release his claim against the bank. A certified check is, then, like a bank note — the maker is released, and the bank is bound directly to the payee.

When fraud becomes an element of the situation, however, the ordinary rule, founded on equitable principles, permitting the defrauded party to trace and recover his property, must apply. 2 PARSONS, CONTRACTS, 9th ed., 949. Thus in the case of a certified check in the hands of a fraudulent payee, the maker has a right to recover it, and the payee holds it in constructive trust for him. See 19 HARV. L. REV. 55. If the bank has knowledge of the facts, it would seem proper not only that it should have the right not to honor the check, but that it should be liable to the maker, if it does honor it. That the payee has turned penitent when he asks the bank to pay the check, and is about to reimburse the maker, is highly improbable, and payment by the bank, with knowledge of these circumstances, is an equitable tort against the maker, an injury to his beneficial interest in the check, the *res*, such as to make the bank liable to him, as *cestui*, for its connivance at the breach of the constructive trust. Cf. 19 HARV. L. REV. 68. Where the payee has been guilty of theft, the same constructive trust relationship would arise; but it is difficult to find the basis on which the drawer could urge any equitable claim where he and the payee are confederates in illegality. In such a case the maker, since he is *in pari delicto* with the payee, is in no position to claim any equity in his own favor. See *McCord v. Bank*, 96 Cal. 197.

DEPENDENT SERVICES OF COMMON CARRIER. — In the general development of the law of public-service companies, certain phases of the subject have received inadequate treatment by courts and text-writers. One of these relates to the dependent services of common carriers. A recent article by Professor Wyman furnishes an admirable discussion of the question, not only collating the leading cases on the points involved, but working out a consistent theory by which to test the conflicting decisions. *The Public Duty of the Common Carrier in Relation to Dependent Services*, by Bruce Wyman, 17 Green Bag 570 (Oct., 1905). The subject involves the relations of railroads to express companies, palace and refrigerator car companies, hackmen at railway stations, transfer companies, etc. The authorities seem to be about equally divided, and as the question has been passed upon as yet in less than half of the States of the country, the subject is a fruitful one for discussion.

The case of the express companies may be taken as typical. Is the carrier bound to furnish express facilities to all express companies which apply, or may it make an exclusive agreement with one company for the carriage of all express matter over its line? The carrier's responsibility is founded on its public duty. It seems that it owes no direct duty to the express companies, for it might, *ultra vires* aside, carry on an express business itself and shut out all express companies from its line. Moreover, it has never held itself out as a carrier for all express companies. Historically the relation has always been based on contracts with individual companies. Its duty is to the shipping public to carry all express matter from one end of its rails to the other. If none of the law of public service applies between the carrier and the express company, however, it follows, argues Professor Wyman, that the latter may be charged extortionate prices by the carrier, which in turn will react upon the public. The express company is itself a common carrier, and therefore bound to carry at a reasonable rate; but this duty is relative, and if it must pay an increased price, it may charge it against the public as a necessary operating expense. To protect the public from such a result the author submits that we must apply the law of public service companies throughout. To insure the public the satisfactory service at a reasonable rate, to which it is undoubtedly entitled, we must hold that the carrier performs its whole duty only by serving all express companies with adequate facilities, without discrimination and for a fair compensation.

It may be argued, however, that since the railroads' only duty is to the public, so long as the public are served to their reasonable satisfaction, it is a

matter of no importance as to the particular agency through which this is accomplished. *Sargent v. Boston, etc., R. R.*, 115 Mass. 416. This doctrine has received the approval of the United States Supreme Court. *The Express Cases*, 117 U. S. 1. On strict legal theory it seems difficult to escape the result reached. Moreover, it does not seem that it allows the exploitation of the public. For if the railroad is under a duty to carry at a reasonable rate, it cannot escape this obligation by delegating the performance of it. Whether it chooses to act through one express company or several, the public may still enforce its right to a reasonable rate from the road. The case does not seem to present any insuperable practical difficulty, as the public may work out its rights as to the transportation of express matter along lines similar to those followed as to the carriage of freight. Professor Wyman's remedy is open to objection from a practical standpoint, in that it would tend to increase through the wastes of competition the reasonable rate which the public must pay.

ALIEN LABOR LEGISLATION AND THE COURTS. *Henry A. Prince*. 41 Can. L. J. 628.

CHRISTIAN SCIENTISTS AND THE LAW. *Walter Mills*. Demanding that they be treated as physicians in so far as to place them under the Medical Acts. 4 Can. L. Rev. 435.

COMPARATIVE STUDY OF THE CONSTITUTIONS OF THE UNITED STATES OF MEXICO AND THE UNITED STATES OF AMERICA, A. *William H. Burges*. Stating and contrasting seriatim the provisions of the Constitutions of the two countries. 39 Am. L. Rev. 711.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY, THE. *T. M.* Advocating the abolition of the distinction between realty and personalty save in so far as inherent in the nature of things. 9 L. Notes (N. Y.) 125.

EXCLUSION AND DEPORTATION OF ALIENS. *Parliamentum*. Considering whether an act to return an alien "to the country whence he came" is extra-territorial in effect. 25 Can. L. T. 487.

EXCLUSIVENESS OF THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE. I, II. *James S. Rogers*. 53 Am. L. Reg. 529, 593.

EXIT OF THE DOCTRINE OF SITUS. *John R. Rood*. A favorable comment upon the recent decision of *Harris v. Balk*, 25 Sup. Ct. Rep. 625, holding that where a debtor is garnisheed while temporarily within a foreign state and compelled to pay the debt, such payment furnishes a defense to a subsequent action by his creditor in the state where the debt was created. 61 Cent. L. J. 265.

FEDERAL SUPERVISION OF INSURANCE. *Anon.* 9 L. Notes (N. Y.) 123.

JURISDICTION RATIONE ORIGINIS. *George Duncan*. Arguing that a Scottish domicile and personal citation will give jurisdiction against a defendant living outside of Scotland, in a petitory action. 17 Jurid. Rev. 254.

LEGITIMATE FUNCTIONS OF JUDGE-MADE LAW. *Hannis Taylor*. An historical sketch of the importance of case law in supplementing constitutions and codes and in adapting them to changed conditions of society. 17 Green Bag 557.

PROCESS TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS, OF. *Anon.* 49 Sol. J. 721, 733, 741, 748, 757.

PUBLIC DUTY OF THE COMMON CARRIER IN RELATION TO DEPENDENT SERVICES. *Bruce Wyman*. 17 Green Bag 570. See *supra*.

STOPPING PAYMENT OF A CERTIFIED CHECK. *Anon.* 22 Bank. L. J. 411. See *supra*.

TREATIES AND EXECUTIVE AGREEMENTS. *John Bassett Moore*. Pointing out distinctions to be observed when the question arises, whether ratification by the Senate is necessary. 20 Pol. Sci. Quar. 385.

WHERE THERE IS A BREACH OF CONTRACT WHICH MAY BE REGARDED AS TOTAL, IS THE INJURED PARTY PREVENTED FROM RECOVERING FUTURE DAMAGES, BY BRINGING AN ACTION ONLY FOR PAST DAMAGES, WHERE THE TIME FOR FULL PERFORMANCE HAS NOT ARRIVED? *Anon.* Criticising a New York case which held that injured party could not recover future damages. 61 Cent. L. J. 281.

II. BOOK REVIEWS.

CONSTITUTIONAL LAW OF ENGLAND. By Edward Wavell Ridges. London: Stevens & Sons, Limited. 1905. pp. xxxii, 458. 8vo.

This is a book of the hour, inspired by the two great issues that engross the attention of the thinking classes in England at the present moment, imperial federation, political and commercial. The author evidently has these matters very much at heart and has written with the aim of furnishing all those who have the same interest a practical handbook enabling them to post themselves rapidly on any of the numerous details of the constitutional mechanism that holds together the complex political entity known as the British Empire. In other words, it would be useless to turn to it for a careful exposition of the evolution of the constitution as it exists to-day, or again for a broad and philosophic treatment of constitutional questions such as we might expect from Mr. James Bryce. Mr. Ridges' aim is closely circumscribed by existing conditions; his method is too handbooky, if the term may be used, to permit digressive and comparative disquisitions.

Within the limits he has chosen Mr. Ridges does his work well. He divides and subdivides his subject clearly, and details are easy to find. He has six principal parts: 1, The Nature and Sources of English Constitutional Law; 2, The Legislature and the Public Revenue; 3, The Executive; 4, The Judiciary; 5, The Church; the Navy and the Army; 6, Countries subject to the laws of England. Within these parts are chapters and sections that range in matter from Wei-Hai-Wei to the Isle of Man, from the Indian Civil Service to the Court of Pied Poudre, and from the origin of the title of Duke to the incidence of the death duties.

Mr. Ridges attains a good standard of accuracy; among his infrequent slips the following may be noted. In Miller's case (p. 70) Wilkes was not, as stated, committed to the Tower. He refused to appear before the House of Commons except as member for Middlesex, and the House shirked the fight and let him go. George III. presided over a Cabinet Council on at least one occasion, and it is incorrect to say (p. 143) that "since the reign of George I the Crown has ceased to attend meetings of the Cabinet." At p. 15 there is a bad error in the number of States composing the American Union. Mr. Ridges defines constitutional law as embracing laws proper and conventions. These conventions he groups under eleven heads, the last two of which appear open to some exception. These two constitutional conventions are thus stated:

"(10) The foreign policy of the country ought to be conducted according to the wishes of the two Houses of Parliament, and in case of difference between the Houses, in accordance with the wishes of the House of Commons.

"(11) Declaration of war or peace against the will of the House of Commons is unconstitutional. In cases of sudden emergency (e. g. insurrection or invasion), if the Ministry require additional authority, they should convene Parliament."

Now if a convention means an actual tacit understanding, then surely Mr. Ridges goes too far in trying to make the ultimate power of the electorate anything more than a potential factor in this case. The attitude of the House of Commons towards the conduct of foreign affairs has long been one into which an element of self-effacement has entered. The Crown has continued to exercise a large amount of discretion, whether acting on its own initiative or on the advice of ministers. Not only is it the case that treaties implying war or concluding peace are constitutionally valid without reference to Parliament, but the House of Commons has rarely, if ever, shown any disposition to assert any greater right in such a case than that which it holds in every case of passing a hostile vote against the responsible Ministry. It might even be said that under the last two British sovereigns, Victoria and Edward, the House of Commons has viewed with complacency the personal intervention of the sovereign on more than one occasion. In another important question, that of imperial federation,

Mr. Ridges appears to miss some important points. His statement that "the federation of all the Australasian colonies . . . under the Commonwealth of Australia Constitution Act, 1900, marks another stage in the advance of the Empire towards cohesion and unity," is one that will not find universal acceptance; to many it appears that the assimilation of the Australasian constitution to that of this country makes eventually for a complete regrouping of the Anglo-Saxon communities. Then again in discussing the various schemes of federation before the British public at present, he hardly does justice to the least ambitious of them, that of which Sir Frederick Pollock is the energetic sponsor. Mr. Ridges' point is that a committee of the Privy Council specially constituted to advise on colonial affairs would have no weight for lack of legislative or executive functions; but the answer to this is that this body might, as it became more and more useful, gradually work its way into a position of constitutional importance very much as the Cabinet has, which, indeed, is the main hope of those who advocate this measure.

The criticisms made are of details and do not affect the value of the book which, as a handbook for students or for those interested in the question of federation, should certainly prove a convenient guide.

R. M. J.

A SELECTION OF CASES ILLUSTRATIVE OF THE ENGLISH LAW OF TORTS.

By Courtney Stanhope Kenny. Cambridge: University Press. 1904. pp. xiv, 632. 8vo.

This attractive collection of cases published by the Cambridge Press inevitably suggests comparison with a similar volume lately issued at Oxford under the editorship of Messrs. Radcliffe and Miles. (See 18 HARV. L. REV. 159.) Both books are avowedly designed to accompany Sir Frederick Pollock's treatise on Torts; but Dr. Kenny's book follows Sir Frederick's classification more closely and is, on the whole, more satisfactory than the Oxford compilation. A logical development of the subject is evident, both in the subdivisions and in the cases under the various heads. Yet, perhaps, this collection errs in ambitiously including too much within its scope. Thus the cases on Principal and Agent might have been spared from a selection of illustrative cases on Torts. And while one hesitates to differ with an experienced teacher such as Dr. Kenny, one might well think it better to follow an inductive treatment throughout in a case-book, by commencing with specific torts, rather than to adopt Sir Frederick Pollock's method of presenting first the general principles of liability.

This collection offers a greater diversity and quantity of cases than the earlier volume, many of the opinions being considerably abridged. The compiler has wisely not confined himself to English cases. Thus, he summarizes and gives extracts from *Vegeahn v. Guntner* (167 Mass. 92), though this treatment is hardly adequate for a full appreciation of the case and the opinion of Mr. Justice Holmes. An interesting note on *Fair Comment* (p. 318) cites the recent *Cherry Sisters' case* in Iowa (114 Ia. 298). Portions of the opinion in the famous *Roberson Case* (171 N. Y. 538), denying the right of privacy, are printed, and in a note (p. 367) referring to the article of Messrs. Warren and Brandeis on "The Right to Privacy" in 4 HARV. L. REV. 193, the editor comments on the failure of the "effort of the Harvard Law Review to provide a remedy." Probably by this time English readers know that the narrow view of the New York court has been changed by statute and that, still more recently, the New York doctrine has been repudiated on common law grounds by the Georgia court. See 18 HARV. L. REV. 625. In this connection, Dr. Kenny prints a most interesting extract from an Indian decision, showing that in view of local domestic conditions, the right of privacy is recognized in India to a very wide extent. The numerous footnotes throughout the volume, though unpretentious, are suggestive. But in one of these notes the editor seems to lend unwarranted countenance to the theory of degrees of negligence. See 2 AMES & SMITH CAS. TORTS, 2d ed., 143 *et seq.*

The bracketed headnotes are a regrettable feature of the work. This pernicious plan indulgently gives the answer to the problems, the independent solution of which is one of the most valuable advantages of the study of cases. Further, it results in large, dangerous generalizations of the law, some of which in the present volume are positively misleading. Thus, the headnote to the *Mogul Steamship Case* (p. 195) asserts that "the right of competition exists even when you conduct the competition by means so unusual as to render it 'unfair.'" Again (p. 631), "Your breach of your contract with one person may constitute a tort against another." Throughout the book, headnotes are tainted with the ensnaring word "malice," though in several cases the editor repairs the mischief by calling attention to the misleading use of the term (pp. 187, 308). Further examples could be needlessly adduced. The danger of these notes is the greater because of their attractiveness and their convenient form as a summary of the law. Despite these defects, however, the collection is significant, not merely as another indication of the progressive tendency in English legal education, but also as an effective rejoinder to the unmerited reproach that case-books are dull and uninteresting.

INTERNATIONAL CIVIL AND COMMERCIAL LAW, as Founded upon Theory, Legislation, and Practice. By F. Meili. Translated and supplemented with additions of American and English law, by Arthur F. Kuhn. New York: The Macmillan Company. 1905. pp. xxvii, 559. 8vo.

Growing appreciation of the practical importance of a knowledge of Conflict of Laws is one of the significant features in the development of modern legal instruction. Within the last decade the leading law schools of this country have undertaken to teach the subject to their students, and gradually it is being added to the curriculum of other schools. But in spite of this renewed interest in the topic on which Mr. Justice Story wrote one of his best known and most valuable works, very little has been done by legal writers in this country to give to the profession a useful, up-to-date treatise. Much more attention has been given to the subject by Continental jurists; and it is with the work of one of them that this notice has to deal.

The opportunity for fine reasoning which is offered by Conflict of Laws particularly appeals to jurists trained in the civil law. To them, however, law is a philosophy, not a science. Each jurist works out a theory which is logically sound, and which to his mind would solve the conflicts of law. But he disregards entirely, and without compunction, decisions of courts. In the treatise of a continental jurist one finds, not the law as the court makes it, but the law as the writer thinks it should be. Professor Meili's work is no exception to this rule. For that reason its utility to the American lawyers who desire to know foreign law is limited.

On the other hand, the book is of some academic value. The author has consulted, and refers to, treatises by the best known and most distinguished jurists of the several nations of Europe, and he also refers to the codes and law of most countries in which questions in this branch of jurisprudence have been considered. The chief limitation here, and a serious one, is that the codes and law of these several countries are not considered on each and every subject discussed, but the laws of some countries are referred to under one head, and the laws of totally different countries under the next head. In other words, the treatment is not complete. It would have been better to have limited the field of countries to be considered, and to have stated the laws of the countries selected on every point.

The work of translation has been well done. The book as it appears is readable and can be readily understood. Some sentences show, by their construction, their German origin; but they are not so numerous as might have been expected. The translator has added some English and American cases, intending "to state briefly and without discussion or argument, the law recognized in those jurisdictions, upon the principal points dealt with by the author."

Mr. Kuhn frankly says that they are in no sense intended as a full exposition of the law upon the topics treated. He has made a brave attempt, but, from the nature of things, it was impossible for him in that way to make a really valuable contribution. The leading cases on the topics treated are not in all instances given, while a number of the propositions of law are inaccurately or too broadly stated. This latter defect is due to form rather than to real error; but because of it the notes as they stand should be used with some caution. To those interested in the development of Conflict of Laws the book will still be recommended by the amount of learning and useful information gathered within its covers.

S. H. E. F.

LAW OF THE DOMESTIC RELATIONS, embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant. By James Schouler. Boston: Little, Brown, and Company. 1905. pp. xxxix, 421. 8vo.

To praise a law-book because it contains so much which is not law, is ordinarily a doubtful compliment to the author. When that confused subject usually described under the title "Domestic Relations" is under consideration, however, one is prepared to see every rule suspended or reversed. This branch of law our legislatures have so diverted from its original channel that practitioners of to-day are frequently in danger of losing sight of the sources from which it starts. Yet the original common law so controls and modifies the meaning of the various sweeping statutory changes, that any opinion based upon the statutes alone is likely to be most misleading. Accordingly, the writer of the elementary treatise under discussion, who must perforce cover but a small part of the law, has chosen wisely in confining himself to the common law rules bearing upon the legal position of husband and wife, parent and child, infants, and guardian and ward, abrogated in part though they may be, and in dismissing with brief mention the widely varying statutory changes which have taken place in the different jurisdictions.

As a statement of the underlying common law this work is in most respects to be commended. Its clearness of diction and logical development of thought are refreshing. It is precisely the kind of book to be read through with profit by a person unfamiliar with the subject, but with this caution, that the reader must not attribute to it infallibility. The author, unfortunately, has a slight tendency to follow too closely the current form of statement rather than to seek for the substance of the law. For instance, in treating of the liability of infants for necessities, he lays it down in the old way, that the infant is bound by his contract for necessities, and fails to impress the fact that what the infant is bound to do is not to fulfill the contract by paying the contract price, but rather to pay the fair value of the necessities. In the same way he speaks on page 65 of the liability of the husband for necessities properly furnished to the wife as founded on the wife's agency for the husband, and yet concedes on page 82 that the usual principles of agency are inadequate to explain the law. A similar fault is disclosed in his tendency to state moral duty in terms of legal obligation. A conspicuous instance is found in the chapter upon the duties of parents as to their children, in which the author enumerates as legal duties obligations of protection, maintenance, and education, which the common law rather commends as good morals than enforces by appropriate process. As to the chapter concerning void and voidable acts of an infant, so much stress is laid upon the former that the reviewer feels some doubt whether the inexperienced reader might not be misled into thinking the proportion of void acts to voidable far greater than it really is. An unusual omission in the work is that of the names of the cases in many citations. Not the least entertaining part is the homily on marriage, beginning on page 12, in which the present day tendency toward the fuller independence of woman is somewhat deprecated. Further enumeration of defects, however, might convey a false impression of what is in reality a very useful book for the elementary student seeking a general knowledge of that branch of the law of which it treats.

H. LE B. S.

A TREATISE ON THE LAW OF CRIMES. By Wm. L. Clark and Wm. L. Marshall. Second Edition, by Herschel Bouton Lazell. St. Paul: Keefe-Davidson Co. 1905. pp. xxxiv, 906. 8vo.

The second edition of this successful elementary treatise appears in a single large volume, instead of the two smaller volumes of the first edition. This is a desirable change, so far as the lawyer's use of the book is concerned; and it is probably quite as convenient for the student.

Mr. Clark's work has the qualities which make all his books valuable: clearness and completeness of analysis, lucidity of statement, and good judgment and sense of proportion. These qualities are invaluable in a book intended to meet the needs of students. The summaries of doctrine printed in heavy-faced type as "principles" are well-made, brief, and clear. Both students and practicing lawyers will find the book helpful.

One must not expect to find here original discussion of difficult problems of the criminal law; nor should one be surprised to find that the inconsistencies and blunders of the cases on larceny, for example, appear without any attempt to cure or even to point out the errors. A topic which has tried and transcended the powers of a Bishop could hardly be elucidated in an elementary treatise. We must accept the book for what it is, and be grateful; and it is a clear and useful summary of the law as it is ordinarily administered in court.

The work of the editor has been merely to bring the authorities down to date. The new matter is not so distinguished from the old that one can say how much has been added. One useful addition, at any rate, is the references to the cases in Professor Mikell's most excellent collection.

J. H. B.

A MANUAL RELATING TO THE FORMATION AND MANAGEMENT OF MERCANTILE AND MANUFACTURING CORPORATIONS, with Forms. A Book of Massachusetts Law. By George F. Tucker. Second Edition, Revised, including Revised Laws, Statutes of 1903-1905, and Massachusetts Reports, Vol. 187. Boston: Little, Brown, and Company. 1905. pp. xxvii, 401. 8vo.

OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS held at St. Louis, Missouri, U. S. A., September 28, 29, and 30, 1904, under the auspices of The Universal Exposition and The American Bar Association. Edited by the Secretary of the Congress. St. Louis: Published by the Executive Committee. 1905. pp. xix, 423. 8vo.

CORPORATIONS. A Study of the Origin and Development of Great Business Combinations, and of their Relation to the Authority of the State. By John P. Davis. In two volumes. New York and London: G. P. Putnam's Sons. 1905. pp. ix, 318; iii, 295. 8vo.

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PROCEEDINGS OF THE FOURTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, held at St. Louis, Missouri, September 22, 23, and 24, 1904. Reprinted from the Transactions of the American Bar Association for 1904. pp. 193. 8vo.

A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES. Based on the Decisions of all the States. By George B. Clementson. St. Paul, Minn.: West Publishing Co. 1905. pp. lxi, 350. 8vo.

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NO. 3

DOMINANT OPINIONS IN ENGLAND DURING THE NINETEENTH CENTURY IN RELATION TO LEGISLATION AS ILLUSTRATED BY ENGLISH LEGISLATION, OR THE ABSENCE OF IT, DURING THAT PERIOD.

PROFESSOR DICEY, Vinerian Professor of English Law, in the University of Oxford, has recently published, through Messrs. Macmillan & Co., a book with the following title: "The Relation between Law and Public Opinion in England during the Nineteenth Century." The book is the outcome of a course of lectures delivered by the author, seven years ago, at the Harvard Law School, pursuant to an invitation, accepted by him, as he informs us in his preface, to lecture at that School on the History of English Law during the Nineteenth Century. The title of the book invites inquiry. 1. In what sense does the author use the term "law"? As commonly used by lawyers, the word means law as administered by courts of justice in suits between litigating parties, but here it is clearly not used in that sense, but in the sense of legislation. 2. What does the author mean by "public opinion"? Who are the persons whose individual opinions taken in the aggregate form that public opinion which the author has in mind? Are they those whose opinions directly control legislation, *i. e.*, the members of the House of Commons for the time being? No, clearly not. The author, it is believed, would not think of calling the opinions of a majority of the members of the House of Commons public

opinion. Nor would there be any propriety in making the relation between the opinions of a majority of the legislators of the country and the legislation which they enact a subject of inquiry, as legislation is supposed to be the direct expression of the opinions of those by whom it is enacted. Although, therefore, the author not unfrequently uses the term "legislative opinion," it does not follow that he uses that term as equivalent to public opinion as used in his title-page. Is it the electorate whose opinions in the aggregate the author treats as forming public opinion? The answer to this question is not so clear; but it seems to me very clear that the electorate constitute only a portion of those whose opinions in the aggregate form public opinion in reference to legislation. The electorate differ from the rest of the people only in this, namely, that they alone have a voice in the election of members of the House of Commons, and consequently they alone have the power to express their disapproval of the course taken by a member, for whom they may formally have voted, by refusing to vote for his re-election, *i. e.*, by voting for some one else. But when a member has once been elected, he represents those who voted against him as much as he does those who voted for him, — he represents also all the people of the city, borough, or district for which he was elected as much as he does those who had a voice in the election, — nay, he represents the entire nation as much as he does the city, borough, or district for which he was elected. The electors may, indeed, require a candidate to give pledges as a condition of their voting for him, and, if he does give pledges, of course he is bound in honor to redeem them, but whether he does so or not, or whether his course as a legislator is satisfactory or not to those who elected him, is a question between him and them only; it is not a question in which any one else has any direct interest. It seems to be clear, therefore, that the author must be taken to have meant by public opinion the opinion of the entire nation, taken in the aggregate, in reference to legislation.

It does not seem to me that the author has been wholly fortunate in making the relation between legislation and public opinion the title of his treatise. My reasons are, first, that the closeness of that relation in England during the nineteenth century is too obvious greatly to require elucidation, as the electorate of that country cannot be supposed to differ greatly in their political opinions from their fellow-subjects; and no intelligent person requires to be told that, whenever the Executive Government finds itself in a minority

in the House of Commons and believes the reason to be that the majority are not in harmony with public opinion, it may dissolve Parliament and order the election of a new House of Commons, or that, whenever the Opposition in the House of Commons finds itself in a majority, it may compel the Executive Government to resign, and so give place to the Opposition, unless the former is prepared to take the responsibility of dissolving Parliament; and, secondly, that public opinion, rather than the relation between legislation and public opinion, is in truth the subject of the book. It may be conjectured, moreover, that the author, in preparing his lectures, felt himself trammelled by the terms of the invitation which he had received, and that he was influenced by that circumstance in giving a title, first, to his lectures, and then to his book. If so, it is a pity, as the title, coupled with the preface, may convey to some persons who are not lawyers the impression that the book is not meant for them, and so induce them to lay it down before they have ascertained for themselves its true character. In truth, the book is in no sense a law book,¹ and some of the most enthusiastic encomiums of it that I have heard have come from gentlemen who have never opened a law book.

Professor Dicey declares, in his opening lecture, that legislation in England during the nineteenth century was more under the control of public opinion than in any other country, not excepting the United States. The only reason that he gives, however, for not excepting the United States is that in that country restrictions are imposed on legislators by the constitutions, both of the United States, and of the several states.² In regard to this, it may be observed, first, that constitutions can exert only a negative influence on legislation; secondly, that, according to Professor Dicey, the true sovereignty in England resides in those who, for the time being, hold the elective franchise, and therefore under the Reform Act of 1832, it resided in the ten-pound householders, while at the present moment it resides in the aggregate of all the householders in the country. If this be so, it seems to follow that our constitutions create one important difference between England and this country which has not attracted much attention; for here, though it may perhaps be said that the sovereignty resides in those who, for the time being, hold the elective franchise, yet it lies entirely

¹ Lecture XI is, however, a partial exception to this statement, the subject of that lecture being "Judicial Legislation."

² Dicey 9.

dormant except when the business before them is the election of representatives to make a new constitution, *i. e.*, delegates to a constitutional convention; or when they are called upon to vote upon a constitution already framed and submitted to them for ratification or rejection. It may be added that the only sovereignty that resides in the people of the United States, in the aggregate, is that portion of sovereignty which has been delegated to them by the people of the several states respectively under the Constitution of the United States. There is one question in this connection as to which we seem to be much at sea, namely, whether a constitution which makes no provision for its own amendment or change can be amended or changed except by a revolutionary act, and consequently whether a constitution which does make provision for its own amendment or change can be amended or changed without reference to such provision except by a revolutionary act. Certain it is that at all ordinary elections held under our state constitutions the electors exercise only a delegated power. The limitations imposed upon the legislative power by our constitutions do not, however, constitute the only reason why public opinion exerts less control over legislation here than in England, especially over federal legislation, for, first, the United States Senate, while it is, like the House of Lords, a permanent body, and each member is elected for six years, yet unlike the House of Lords it exerts a much greater influence over legislation than does the lower House; secondly, our national legislators are frequently elected a long time before they take their seats, and hence may be supposed to represent the public opinion of the time when they were elected rather than that of the time when they take their seats; thirdly, our United States Senators are elected by the state legislatures, and hence they are for that reason much less amenable to public opinion than if they were elected directly by the people of the several states respectively; fourthly, our national legislators come from forty-five different states, and yet no one of them can be fairly said to reflect any other public opinion than that of his own state; and, lastly, our legislators, both state and national, when once elected, are perfectly secure of their seats, until the term for which they were elected expires by its own limitation.

It seems to me, also, that there is a reason why the House of Commons is not likely to reflect the opinion of the country at large as speedily or as perfectly as Professor Dicey seems to suppose it will, namely, in the fact that all Parliamentary elections

are local, an owner or occupier of a house being entitled as such to vote only for the member or members to which the city, borough, or division of a county, in which the house is situated, is entitled; and though the elections generally come near together in point of time, yet they are wholly independent of each other. Doubtless there have been measures in the past which aroused the electors all over the country, or at least very generally, such as the Reform Bill of 1832, or the bill for the repeal of the Corn Laws in 1846, and doubtless there will be such measures in the future, but they are likely to be rare.

Before Professor Dicey reaches the question what were the dominant currents of public opinion in England during the nineteenth century as to legislation, he raises the question whether those which were dominant during the last two-thirds of the century will each admit of the same explanation, namely, the advance of democracy during that period; and to that question his answer is a very decisive negative, his opinion being that there is no *a priori* reason why a democracy should advocate one kind of legislation rather than another; and he further declares that the householders have thus far shown themselves conservative.¹ It would be a great mistake, however, for an American reader to infer that democracy in England, under household suffrage, is the same as, or even much resembles, democracy in this country, or that it would be the same, if household suffrage should, in England, give way to universal or manhood suffrage; and the reason is that electors in England, as such, have not, either directly or indirectly, any voice in or any control over the Executive Government. English democracy begins and ends with a right to vote for members of Parliament. Once in seven years, or oftener in case a Parliament is dissolved before the expiration of the seven years for which it was elected, every elector is entitled to vote for one or more members of a new Parliament, and the right so to vote is what English working-men were struggling for from the middle of the nineteenth century onward. Consequently, the only object that an English elector, as such, can have in voting, or in seeking to influence the votes of others, is thereby to influence legislation, — not to obtain office either for himself or for his friends. Nor is a boss a possibility in English national politics, whether in or out of office, unless, indeed, a man shall appear who combines the qualities of a boss

¹ Dicey 48-61.

with those of a leader of the House of Commons. It is not surprising, therefore, that Professor Dicey should declare the English householder to be conservative in politics. What inducement has he to be otherwise?

Having disposed of the question whether the different currents of public opinion as to legislation which were dominant in England during the last two-thirds of the nineteenth century were merely different degrees of democratic opinion, Professor Dicey proceeds to inquire what were the opinions which were dominant during the century, and to give an account of them; and he declares that each third of the century had a dominant current of opinion peculiar to itself; that the dominant current of opinion peculiar to the first third of the century was a combination of the optimism of the time of Blackstone and that dread of innovation and revolution which had been inspired in England by the French Revolution.¹ This opinion ceased to be dominant on the passing of the Reform Bill of 1832, and Professor Dicey says it would have ceased to be dominant several years sooner but for the fact that the unreformed House of Commons was not sufficiently responsive to public opinion. Professor Dicey calls the period during which it was dominant the period of quiescence or stagnation, or the period of old toryism, as distinguished from the new toryism, which calls itself conservatism. Of course the legislative characteristic of the period was the absence of legislation.

On the passing of the Reform Bill of 1832 the period of quiescence gave place to the period which Professor Dicey calls the period of individualism, or Benthamism, or of Benthamite liberalism.² It was called the period of individualism because, during that period, the leading aim of legislation was to secure to every person the greatest practicable amount of individual freedom, and, on the other hand, to impose upon every one the sole responsibility of taking care of himself. Why was it also called Benthamism? Because the opinion which it represented was chiefly created by Bentham and his disciples, and because Bentham laid down and advocated these two propositions, namely: first, that the aim of legislation should be to secure the greatest amount of happiness to the greatest number of persons, or, in other words, to maximize pleasure and minimize pain; and, secondly, that every person must be assumed to be the best judge of his own happiness, or of

¹ Dicey 62-63.

² *Ibid.* 63-64.

what will give to him the most pleasure and the least pain. Why was it also called liberalism? Because it was the view of legislation advocated by the now dominant liberal party, which had taken the place of the old whig party.

As the doctrine of individualism is also the doctrine of *laissez-faire*, how does it happen that the period of individualism, instead of being, like the preceding period, one of legislative quiescence, was a period of great legislative activity? Because at the beginning of the period inequality everywhere prevailed, privilege for the few and restraint upon the many being the rule; and hence a period of legislative activity was necessary in order to get rid alike of privilege and restraint, and to substitute equality for inequality. One of the things upon which individualism especially insisted was freedom of contract, and the substitution of contract for *status*; and yet Professor Dicey shows that there is a point beyond which freedom of contract favors not freedom, but slavery, and he asks pertinently whether a man shall be free to make a contract which will deprive him of freedom; also whether an unlimited number of men should be at liberty to form themselves into an association, for example, a trades-union, and bind themselves respectively, *i. e.*, each to all the others, to act in accordance with the decision of a majority of the members; and I understand Professor Dicey's opinion to be in the negative, or, at least, that the doctrine of individual freedom of contract does not properly extend to such a case.¹

Professor Dicey is of opinion that individualism ceased to be dominant at about the beginning of the last third of the century, and then gave place to what he calls collectivism, and sometimes socialism. With him, however, the term "collectivism" seems scarcely to mean more than *anti-individualism*, though the term would seem to have at least this affirmative meaning, that it favors the interference of the state in behalf of some persons or classes, and, therefore, at the expense of others. How, then, does the state of things which it favors differ from the state of things which existed during the first third of the century? Its advocates will answer, with much emphasis, that collectivism favors the interference of the state in behalf of the poor and the weak, and at the expense of the rich and the strong, while in the first third of the century the interference was in behalf of the rich and the strong, and at the expense of the poor and the weak.

¹ Dicey 149 *et seq.*

A conspicuous and most interesting feature of the book is the manner in which the author brings out the fact that a dominant current of public opinion and also one or more counter-currents commonly exist side by side, the latter constantly opposing and modifying, in a greater or less degree, the action of the former. Thus, during the entire period of old toryism, there was a counter-current of individualism, which was constantly growing and increasing in strength; but when at length it had become strong enough to do battle successfully with its adversary in the open, it found the latter intrenched behind an unreformed House of Commons; and, therefore, the first task to which it must set itself was the reform of that House; and this gives the author an opportunity to show the condition that England was in, in respect to representation, during the first third of the century,—an opportunity of which he most effectively avails himself.¹

It would ill become an American to speak flippantly of the unreformed House of Commons,—the venerable mother of all representative assemblies. There had never been any attempt to make such a distribution of seats in the House of Commons as would give to every elector an equal voice in the legislation of the country; nor could such a distribution have been made with any approach to accuracy prior to 1801, as there had been no enumeration of the population prior to that time. All that had been attempted, therefore, had been to give every important interest a representation, so that it might be sure of a hearing in Parliament. Nor had it been foreseen that time might bring a great increase or a great shifting of population, and therefore no provision had been made for either; and hence the number, as well as the distribution of seats was fixed and permanent, and no change could be made in either without an Act of Parliament. Moreover, as no change could be made in either, except at the expense of existing interests, it was not to be supposed that the latter would permit it to be made without a struggle to prevent it. In 1832, however, four decennial enumerations of the population had been made, and the population of England and Wales had, between 1801 and 1831, increased from eight millions to thirteen millions. The country, moreover, had recently changed from an agricultural to a manufacturing country, and there had been in consequence great shiftings of population, particularly from the South and Southwest to the North. Large manufacturing cities had suddenly sprung up

¹ Dicey 111-117.

in the North, and Liverpool had taken the place of Bristol as the second seaport of the kingdom. Meantime, what was the state of the representation? Professor Dicey answers that of a total number of 548 members of the House of Commons, as that House existed until the union with Ireland, 200 were elected by less than 7,000 electors, and that while the County of Cornwall had 42 members, Birmingham and Manchester were wholly unrepresented.¹ Yet it should not be forgotten that it was in the unreformed House of Commons that the two Pitts, Burke, and Fox made all their great Parliamentary speeches, and that Burke represented a "rotten borough" during twenty-three of the twenty-nine years of his Parliamentary career.²

When, upon the passing of the Reform Bill of 1832, individualism became the dominant public opinion, the previously dominant toryism became a counter-current, and almost immediately hostility to *laissez-faire* also began to show itself as a rising power. Professor Dicey, indeed, quotes³ very strong expressions of opinion to that effect by Southey as early as 1829, and by Dr. Arnold and Carlyle, respectively, in 1838 and 1839. Southey says: "Moral evils are of [man's] own making; and undoubtedly the greater part of them may be prevented, though it is only in Paraguay (the most imperfect of Utopias) that any attempt at prevention has been carried into effect."⁴ Dr. Arnold, speaking of the neglect to provide a proper position in the state for the manufacturing population, says: "This neglect is encouraged by one of the falsest maxims which ever pandered to human selfishness under

¹ Dicey 115.

² During his first nine years in Parliament, from 1766 to 1774, both inclusive, he sat for Lord Verney's borough of Wendover. During the next six years he sat for the city of Bristol, and during the remaining fourteen years he sat for the Marquis of Rockingham's borough of Malton.

³ Dicey 214-216.

⁴ Professor Dicey quotes from Macaulay the following description of Southey's theory of the functions of government: "He conceives that the business of the magistrate is not merely to see that the persons and property of the people are secure from attack, but that he ought to be a jack-of-all-trades, — architect, engineer, schoolmaster, merchant, theologian, a Lady Bountiful in every parish, a Paul Pry in every house, spying, eaves-dropping, relieving, admonishing, spending our money for us, and choosing our opinions for us. His principle is, if we understand it rightly, that no man can do anything so well for himself as his rulers, be they who they may, can do it for him, and that a government approaches nearer and nearer to perfection, in proportion as it interferes more and more with the habits and notions of individuals. He seems to be fully convinced that it is in the power of government to relieve all the distresses under which the lower orders labor." (Dicey 214, n. 1.)

the name of political wisdom — I mean the maxim that civil society ought to leave its members alone, each to look after their several interests, provided they do not employ direct fraud or force against their neighbor. That is, knowing full well that these are not equal in natural powers, — and that still less have they ever within historical memory started with equal artificial advantages, knowing also that power of every sort has a tendency to increase itself, we stand by and let this most unequal race take its course, forgetting that the very name of society implies that it shall not be a mere race, but that its object is to provide for the common good of all, by restraining the power of the strong and protecting the helplessness of the weak." Carlyle says: "That the arrangements of good and ill success in this perplexed scramble of a world, which a blind goddess was always thought to preside over, are in fact the work of a seeing goddess or god, and require only not to be meddled with: what stretch of heroic faculty or inspiration of genius was needed to teach one that? To button your pockets and stand still is no complex recipe. *Laissez faire, laissez passer!* Whatever goes on, ought it not to go on? . . . Such at bottom seems to be the chief social principle, if principle it have, which the Poor Law Amendment Act has the merit of courageously asserting, in opposition to many things. A chief social principle which this present writer, for one, will by no manner of means believe in, but pronounce at all fit times to be false, heretical, and damnable, if ever aught was." Professor Dicey adds that these "three men of genius agreed in nothing but in their common distrust of *laissez-faire*, and in their conviction that some great exertion of the authority of the state was needed for the cure of the diseases which afflicted the commonwealth." This conviction was shared in by an ever increasing number of persons for the next thirty years, or until about 1870, when it seems to have become dominant. By what means was individualism thus overthrown, and collectivism enthroned in its place? A short answer seems to be that it was by means of an alliance between toryism and the working-classes, as old toryism had been overthrown in 1832 by an alliance between the Benthamites and the whigs. Nor was an alliance between the most aristocratic and the most democratic class at all surprising. The Benthamites belonged as a rule to the great middle class, which received a great accession of strength from those on whom the electoral franchise was conferred by the Reform Bill of 1832, which was passed wholly in the inter-

est of the middle class. It was not to be supposed, therefore, that working-men would feel particularly friendly to those next above them, and who were in the full enjoyment of political rights from which they themselves were wholly excluded. Moreover, the employers of labor belonged to the middle class, and they, in respect to the working-classes, represented capital, as the working-classes represented labor, and the relation between capital and labor seems seldom to be more friendly than that of an armed truce. Between tories and working-men, on the other hand, there existed no relation calculated to excite hostility, and the former were too far above the latter to excite in them a feeling of jealousy. Besides, neither the tories nor the working-men had much to hope for politically, except through an alliance with each other. The one political object of the tories was to overthrow the liberals and reinstate themselves in power, and they had but a slim prospect of accomplishing this object, except with the aid of the working-men. The latter, moreover, had little to hope for from the liberals, who did not need their assistance, and whose very creed precluded them from legislating in favor of one class at the expense of another, and, therefore, precluded them from legislating in favor of working-men at the expense of capital.

It was not, however, till near the beginning of the last third of the century that any conscious alliance between tories and working-men was brought about, though there was an unconscious alliance between working-men and a portion of the tory party during nearly the whole of the second third of the century, or at least the latter were very earnest workers in the interest of the former. What was the field in which they thus worked? In the field of legislation in the interest of factory operatives and at the expense of manufacturers. This legislation constituted what Professor Dicey calls the factory movement, and his account of it forms one of the most brilliant portions of his book.¹ He assures us that this movement originated wholly with philanthropic tories, and that it was under their guidance to the end. To show how rapidly the movement grew in strength, it is only necessary to say that as early as 1847, only a year after Benthamism had achieved its crowning victory in the repeal of the Corn Laws, the friends of the factory movement were strong enough to carry the Ten Hours Bill,² to defeat which its enemies had marshalled all their strength.³

¹ Dicey 219-239.

² 10 & 11 Vict. c. 29.

³ Professor Dicey quotes from Lord Shaftesbury's private diary a passage from

To show also how comprehensive the movement was, and how great a share it had in the victories of collectivism, it may be added that it finally culminated in the passing of the labor code of 1901.¹ If the work done by the tory leaders of this movement had not stirred the hearts of the working-men on whose behalf it was undertaken and carried through, they would have been ingrates indeed. If any reader of this article should still be in doubt as to whether he shall read Professor Dicey's book, let him read the "characters," as drawn by Professor Dicey, of the leaders of this movement, namely, Robert Southey, Richard Oastler, Michael Sadler, and Lord Shaftesbury.²

At length, Disraeli had the sagacity to educate his party into the formation of an open alliance with working-men. Professor Dicey says the collapse of the Southern Confederacy formed an era in the advance of democracy in England; that while the aristocracy and wealth of England had given their moral support to the "lost cause," the working-men had recognized in the War of Secession a contest between democracy and oligarchy, had patiently endured the hardships of the cotton famine which it caused, and calmly and confidently awaited its outcome; that the working-men of England consequently shared, to some extent, in the victory won by democracy in America, and found themselves at the close of the war in a much stronger position politically than ever before; and that it was plain to all that the elective franchise must be further extended. Accordingly, at the next session of Parliament, Gladstone brought in a reform bill, but after a long continued and very able debate, it was defeated; the liberal ministry resigned, and the conservative party came into power. At the next session of Parliament another reform bill was brought in by Disraeli, and carried, which conferred the elective franchise upon the artisans of towns; and this Act was followed by another in 1884, which conferred it upon all householders, and so upon country laborers.

It must not be supposed, however, that collectivism has advanced itself by the same method as individualism, nor that it has produced the same effect upon the conservative party that indi-

which it appears that, in carrying through the Ten Hours Bill, he encountered nothing but hostility from Sir Robert Peel, O'Connell, Gladstone, Brougham, Bright, Cobden, and Miss Martineau. (Dicey 233)

¹ Factory and Workshop Act, 1901, 1 Edw. VII, c. 22.

² Dicey 223-231.

vidualism did upon the whig party. Individualism was a doctrine and a theory; was loudly proclaimed and aggressive. Collectivism, on the other hand, is not a theory, but a practice. It is an influence which is not openly acknowledged. Its very name indicates this, *i. e.*, it is used because of its vagueness, because of the little meaning that it conveys, and because of its consequent harmlessness. In short, it is used in order to avoid using "socialism." Socialism is, indeed, a theory, but it is one with which no practical politician would, in England, be willing to identify himself. It has worked its way silently and is known only by its fruits. Individualism, or Benthamism, may almost be said to have swallowed up the old whig party, and it certainly gave it a new name. It had, like the tory party, been living upon its traditions, but Benthamism infused into it new life and vigor. Collectivism, on the other hand, has affected the conservative party only by increasing its numbers, and its consequent political strength. Ostensibly, at least, the latter remains, in other respects, what it was before collectivism was heard of. In short, the conservative party has never adopted socialism as part of its creed, as the whig party did individualism. It has courted the working-classes, but it has done so, not by adopting their theories, but by making concessions to them, and by conferring upon them great practical benefits, or at least, what the latter so regarded. It is to be remembered also that paternalism in government was always a part of the tory creed.

I have shown the manner in which Professor Dicey combines the treatment of dominant public opinion as to legislation with the treatment of counter-currents on the same subject. To make his view complete, however, he finds it necessary to consider another species of subordinate currents of opinion, namely, cross-currents. What is the distinction which Professor Dicey makes between counter-currents and cross-currents? A counter-current is always in direct opposition to the existing dominant opinion. It sometimes consists of an opinion which has previously been dominant, but which, having ceased to be dominant, has become a counter-current. Such was old toryism after the passing of the Reform Bill of 1832. It may also consist of some new opinion in opposition to the dominant opinion, and which the latter has caused to spring up. Such was the collectivism which represented hostility to individualism and *laissez-faire* during the dominance of the latter. A cross-current, on the other hand, is one which is independent alike of the dominant opinion, and also of any counter-currents

which may exist. One of its characteristics must, it seems, always be that it extends to a part only of the entire field of legislation; for if it extended to the whole field it would necessarily become a counter-current. It seems also that it must, in order to make itself felt, substantially control, or at least modify, that portion of legislation to which it extends. While, therefore, a cross-current of opinion generally extends only to such legislation as affects directly a single class of the people, it must, in order to be successful, enlist the sympathy and support of a large portion of the entire nation. And such was the current of opinion which Professor Dicey selects for the illustration of the nature and working of cross-currents of opinion, namely, the cross-current of clerical or ecclesiastical opinion, *i. e.*, the opinion which controlled, or greatly modified, legislation affecting the national Church during the last two-thirds of the nineteenth century. To this subject he devotes substantially the whole of his tenth lecture, and the work is most admirably done. He begins by showing that immediately after the passing of the Reform Bill of 1832 the opinion was well-nigh universal that the Church was in great peril. "The policy of the popular leaders, whether whigs or Benthamites, was essentially secular and anti-clerical. The whigs had always been the cool friends, if not the foes, of the clergy, and had found their most constant adherents among Dissenters. The doctrines of Bentham clearly pointed towards disestablishment. In 1832 popular feeling identified zeal for the Church with opposition to reform, and considered bishops and parsons the natural allies of borough-mongers and tories. At the moment when the vast majority of the electors demanded Parliamentary reform with passionate enthusiasm, no class was the object of more odium than the bench of Bishops. Proposals were once and again brought before Parliament to expel them from the House of Lords. Whatever, again, might be the other effects of the Reform Act, it assuredly gave new power to what was then termed the Dissenting interest; at the meeting of the first reformed Parliament it seemed for a moment possible that Dissenters might exercise political predominance, and the rule of Nonconformists could mean nothing less than a revolution in the position of the Church.¹ . . . In these circumstances observers of the most different characters and of opposite opinions felt assured that the Church was in danger. In 1833

¹ Dicey 312.

Macaulay wrote that in case the House of Lords should venture on a vital matter to oppose the Ministry, he 'would not give sixpence for a coronet, or a penny for a mitre.'¹ Between 1830 and 1836, then, it was assuredly no unreasonable forecast that the future of the Church of England might be summed up in the formula, 'either comprehension or disestablishment'; the Church must, men thought, either embrace within its limits the whole or nearly the whole of the nation, or cease to be the National Church.² The experience of more than seventy years has given the lie to reasonable anticipations. The country has, since 1832, been represented first by a middle-class Parliament, and next by a more or less democratic Parliament, yet has not sanctioned either comprehension or disestablishment. In all ecclesiastical matters, Englishmen have favored a policy of conservatism combined with concession. Conservatism has here meant deference for the convictions, sentiments, or prejudices of churchmen, whenever respect for ecclesiastical feeling did not cause palpable inconvenience to laymen, or was not inconsistent with obedience to the clearly expressed will of the nation. Concession has meant readiness to sacrifice the privileges, or defy the principles, dear to churchmen whenever the maintenance thereof was inconsistent with the abolition of patent abuses, the removal of grievances, or the carrying out of reforms demanded by classes sufficiently powerful to represent the voice or to command the acquiescence of the country.

"What have been the circumstances that have given rise to this unforeseen and apparently paradoxical policy of conservatism and concession? To put the same enquiry in another shape: what have been the conditions of opinion which, in the sphere of ecclesiastical legislation, have prevented the dominant liberalism of the day from acting with anything like its full force, and have in many instances rendered it subordinate to the strong cross-current of clerical or Church opinion?

"These circumstances or conditions were, speaking broadly, the absence of any definite programme of Church reform commanding popular support; and the unsuspected strength of the hold possessed by the Church of England on the affections of the nation.

"The whigs certainly failed to produce any clear scheme of ecclesiastical reform.³ . . . Nor did the Benthamites stand in a

¹ Dicey 314.

² *Ibid.* 315.

³ *Ibid.* 316.

stronger position than the whigs. The philosophic radicals held all ecclesiastical establishments to be at best of dubious utility, and expected them to vanish with the progress of enlightenment. In all matters regarding the Church they were utterly at sea. They were stone-blind to the real condition of opinion in England.¹ . . . In ecclesiastical affairs they possessed neither insight nor foresight; they did not understand the England in which they lived, they did not foresee the England of the immediate future.² . . .

"The Church establishment, further, if in 1832 it was strong both in its own inherent strength and in the weakness of its opponents, assuredly obtained, for some time at any rate, a great increase of power from the High Church movement.³ . . . It was a most successful effort to impress upon churchmen, and especially upon clergymen, the belief that the very existence of the Established Church was in peril, to inspire clerical convictions with new life, and to place Church opinion in direct opposition to the liberalism which undermined the basis of ecclesiastical authority.⁴ . . . The High Church movement reinvigorated the faith of the clergy in their own high authority; it disciplined them for political no less than for ecclesiastical conflicts.⁵ . . . Newman and his allies created such a Church party as had not existed in England since the days of the Stuarts.⁶ . . .

"Gradually the necessary, or at any rate the easiest, line of action became clear. The fundamentals of the establishment must be left untouched; patent abuses which shocked the dominant opinion of the day, or grievances which irritated powerful classes, must be removed, but even the most salutary reforms might be long delayed and tempered or curtailed out of deference to the principles or the sentiment of churchmen. Here we have the policy of conservatism combined with concession which has coloured the whole of modern ecclesiastical legislation."⁷

Here I must take leave of this fascinating book. It is a remarkable book in many ways. The author says in his preface: "It cannot claim to be a work of research; it is rather a work of inference or reflection." I should say, however, that the author has ransacked English literature for the most apposite and striking proofs and illustrations of his inferences and reflections. In reading, too, his "characters" of public men, whom he can have known

¹ Dicey 320.

⁵ *Ibid.* 392.

² *Ibid.* 322.

⁶ *Ibid.* 330.

³ *Ibid.* 327.

⁷ *Ibid.* 333.

⁴ *Ibid.* 328.

only through their writings or through the testimony of others, one wonders if he has spent his life in studying these men. He claims no merit for his facts, and yet his pages are crowded with facts as well as reflections of the most interesting and instructive character. Any American who wishes to know the England of the nineteenth century as if he were a native will find in Professor Dicey, who is a worthy successor of Blackstone, an incomparable instructor.

C. C. Langdell.

CAMBRIDGE, December, 1905.

CONGRESS, AND THE REGULATION OF CORPORATIONS.

AMONG the powers which the Constitution vests in Congress, was one whose grant few opposed and from which no apprehensions were entertained.¹ This was "the simple power of regulating trade."² At a time when the powers given to Congress were "extorted from the grinding necessity of a reluctant people"³ this power was given by "the common consent of America."⁴ Persons who opposed every other means to strengthen Congress consented to this grant. "Why not," it was asked, "give Congress power only to regulate trade?"⁵

For the greater part of the first century under the Constitution, the construction placed upon the power thus granted, was such as to justify this attitude. The power was not of an absorbing nature, nor one whose possession enabled Congress to invade either the jurisdiction of the states or the personal liberty of individuals.

Recently, however, the power seems wholly to have changed its character. The right to engage in foreign and interstate commerce, it is now said, is derived solely from the federal government. All the industrial and transportation interests of the country—except a few of the smallest—are, therefore, it is said, within federal control.

This new construction of the commerce clause is advanced, not as a necessary result of explicit constitutional provisions, but, frankly, to justify specific legislation—the regulation of corporations—which the President has for some time advocated, and now again in his annual message urges upon Congress. The first popular statement of the argument by which such legislation is to be supported was made by Mr. Knox, when Attorney-General.

Admitting, apparently, as is unavoidable, that the manufacture and production of articles of commerce are within state jurisdic-

¹ Federalist, No. 45.

² Speech of William Symmes in Convention of Massachusetts, 2 Elliot Deb. 70.

³ See Von Holst, Const. Hist. 1750-1832, p. 63.

⁴ Speech of Robert Livingston in Convention of New York, 2 Elliot Deb. 214.

⁵ Speech of Gen. Thompson in Convention of Massachusetts, 2 Elliot Deb. 80.

tion, as is also the creation of corporations, determination of amount of capital, publicity of operation, etc., Mr. Knox argued that Congress may "deny to a corporation, whose life it cannot reach, the privilege of engaging in interstate commerce, except upon such terms as Congress may prescribe to protect that commerce from restraint. Such a regulation," he said, "would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."¹

In other words, then, the argument is that Congress has uncontrolled power to tax, regulate, or even to prohibit interstate commerce, and that it may use this power to accomplish results which are wholly beyond its jurisdiction.

If these two views of the Constitution represented merely the doctrines of present and opposing schools of constitutional construction, such a difference of opinion upon fundamental questions would still be unfortunate. If, however, this difference be not so much between schools as between present and past, if it mark a fundamental change in the national conception of the Constitution and in the spirit of its administration, the significance of the policy toward which the country is moving becomes apparent; for important as undoubtedly are the economic questions whose agitation has given rise to new constitutional doctrines, the preservation of the Constitution is more important still. "There is one point," Mr. Lecky said, "on which all the best observers in America, whether they admire or dislike democracy, seem agreed. It is, that it is absolutely essential to its safe working that there should be a written constitution, securing property and contract, placing serious obstacles in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent, and mere casual coalitions from overthrowing the main pillars of the State. In America, such safeguards are largely and skilfully provided, and to this fact America mainly owes her stability."²

Unfortunately there seems to be a growing impatience with these very safeguards; a belief that the Constitution is not in all respects adequate to existing conditions, and that new powers

¹ Speech at Pittsburg, Oct. 14, 1902; copied in 36 Cong. Rec. 412. See also first annual report of Commissioner of Corporations; Democratic National Platform, 1904; Annual Report of Secretary Metcalf of Department of Commerce and Labor, December, 1905.

² Democracy and Liberty, Vol. I. p. 136.

should be assumed by and supported in the federal government.¹ The statement of this proposition is probably its best answer, for there is no general desire to question the supremacy of the Constitution, either directly or by constructions which are recognized as unsound. It is still true, as Jefferson said, that to take a single step beyond the powers which the Constitution has drawn around Congress "is to take possession of a boundless field of power no longer susceptible of any definition."² This congressional supremacy is not advocated on any hand, nor is it sought to impose the ultimate authority upon Congress and the Supreme Court together. Participation in such a partnership is, in a democratic government, wholly incompatible with life tenure of office and sooner or later must destroy the authority of the judiciary.

Rousseau said that popular government, more than any other, "most strongly and constantly tends to change its form, and there is no government, therefore, which demands more courage and vigilance for its maintenance."³ It is for this reason that the Court was established, — not to permit change, but to resist unconstitutional change. The importance and difficulty of its position thus appear, for upon the Court ultimately rests the pressure of the constantly increasing demand for change, and from its members the maintenance of the Constitution demands an ever increasing courage and vigilance.

The principal evils of corporate management which it is said demand federal legislation are those which result from over-capitalization — "watering of stock" — and secrecy of operation and accounts. These matters are admittedly within state jurisdiction and beyond federal control. There is nothing new in the suggestion that Congress should undertake to legislate in this field.⁴

¹ Even as conservative a lawyer as Judge Cooley at one time entertained this view. See "Michigan," *American Commonwealth Series* 346. But he later changed his opinion. See "Written and Prescriptive Constitutions," 2 *HARV. L. REV.* 341. On the general subject see "The Elasticity of the Constitution," by Arthur W. Machen, Jr., 14 *HARV. L. REV.* 200.

² Opinion on U. S. Bank bill.

³ *Social Contract*, Book III., Ch. IV.

⁴ "When the committee have been asked to remedy other evils, such as the watering of stock as a pretext of levying additional tribute upon the people, we have had to meet the friends of such propositions as that with the statement that we have no power, however much we sympathize with them, to take hold of these corporations and deal with them as such, but our powers are limited alone to the regulation of commerce among the States." John H. Reagan, of Texas, in House of Representatives, Jan. 5, 1881, *Cong. Rec.*, 46th Cong., 3d Sess., 11 *Cong. Rec.*, Part I. p. 364.

The novel feature about the present situation is that responsible officers of government now urge Congress indirectly to assume control of these matters by denying or taxing interstate transportation to all corporations failing to conform to such standards as Congress may establish.

In considering the constitutionality of this legislation it is necessary first to review the history of the development of federal power under the commerce clause. Congress has extended its commercial powers into fields over which the framers of the Constitution did not intend that it should have jurisdiction. This new jurisdiction being taken, not granted, the question of its extent can be determined only by reference to the power originally granted and the history of its development. Otherwise, unless limitations upon Congress, imposed under different conditions, may, in a sense by accident, be found to operate in these new fields, the powers of Congress with every assumption of jurisdiction would be unrestricted.

It is therefore proposed briefly to trace the growth of federal power over commerce with relation to the questions involved in the current proposals for trust regulation; and having thus shown the extent of the jurisdiction, it is intended to take up two express limitations upon the federal power: first, the provision securing liberty for every person, and second, the provision that Congress shall not tax articles exported from any state.

The Nature and Extent of the Federal Power.

The provision of the Constitution which compels the courts to distinguish between interstate commerce and that commerce which is domestic within each state presents the problem of projecting a physical boundary line as an economic distinction. In fact, however, there is no economic distinction which even roughly corresponds with state boundaries. Commerce is a whole, and a power to regulate commerce, if complete and unlimited by an arbitrary line of division, must extend to all commerce, wherever conducted. Such a complete power Congress does not possess. The Constitution in fact establishes an arbitrary limit to federal jurisdiction.

A distinction of this nature, however, clear as it may at first be made, is difficult to observe. Courts proceed so largely by logical processes, seeking to create a consistent and harmonious body of decisions, that an arbitrary distinction, undiscoverable by logic, inevitably tends to blur. In the course of time, then, and under

changing conditions, federal powers have undergone a development which must now be accepted as a fact. To understand the existing federal power it is necessary, therefore, to define the original grant of authority, and then to follow the history of its development.

In thus examining the federal power over commerce two facts conspicuously appear: first, that the constitutional grant was not a broad, general jurisdiction, but was a definite authority to accomplish specific purposes; and second, that the development of this power has not been such as to enable Congress to interfere with free transportation, but rather, of a character to secure freedom of transportation, even as against impediments which could not have been foreseen when the Constitution was formed.

The commerce clause seems now popularly to be understood to give Congress such power as was outlined by Randolph in the sixth resolution submitted to the Convention on May 29, 1787. It was then proposed that Congress should be empowered "to legislate in all cases in which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

It is clear, however, that the Convention did not at any stage of its debates contemplate the grant to the federal government of an undefined jurisdiction. Upon this subject there was no division of opinion. Charles Pinckney and John Rutledge objected to the vagueness of the resolution, saying that "they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition." In this Pierce Butler agreed, and Randolph himself "disclaimed any intention to give indefinite powers to the national legislature, declaring that he was opposed to such an inroad on the state jurisdictions."¹

The Convention therefore by common consent proceeded to enumerate all cases in which jurisdiction should be given to Congress, so that, as stated in Massachusetts, only "a well guarded power to regulate trade shall be entrusted to Congress."²

The purpose to avoid indefiniteness appears in many provisions of the completed instrument. Congress, for example, is not only given power to coin money, but specific authority is added to regulate the value thereof and of foreign coin, and to punish counterfeiting. General power is given to declare war, and specific

¹ 5 Elliot Deb. 139.

² Bancroft, Vol. VI. p. 141.

authority is added to grant letters of marque and reprisal, to make rules for the government of land and naval forces, and rules concerning captures on land and water. A general power is given to call forth the militia to execute the laws of the Union, and there is added specific power to suppress insurrections. Power to regulate commerce, then, was not given as an indefinite jurisdiction, but was intended as a specific authority to effect certain well understood ends.

The great purposes which it was sought by the Constitution to accomplish were four in number. It was necessary to establish a federal authority capable of raising a federal revenue, to regulate foreign relations, to prevent the imposition of duties by particular states upon articles brought from other countries, or from or through other states, and to control navigation. These four great purposes were each covered by express provision.

Power to raise a revenue from foreign commerce, implied in the commerce clause,¹ was expressly granted by the provision that Congress may impose taxes, duties, imposts, and excises, subject, however, to the restrictions that duties, imposts, and excises be uniform throughout the country, and that direct taxation be apportioned to the population. Power to control foreign relations was given by the clause which authorized the executive, with the Senate, to make treaties. The prevention of duties by particular states was accomplished by forbidding state taxation of exports and imports.

There remains, then, the commerce clause. What was its meaning? To understand this clause it is necessary to consider the situation and the methods by which commerce was conducted when the Constitution was framed.

The principal commerce at that time was conducted by sailing vessels with foreign nations. Beside this there was also a considerable coasting trade from state to state along the Atlantic seaboard. Interior communication between states had hardly begun. Such as existed was carried on by horse and wagon, and by vessels or flatboats on rivers. It was, however, to the foreign and the coasting trade that the attention of the country was directed. This trade, James Bowdoin said, was in a "miserable state" because of the want of power in Congress.² Other nations prohibited our vessels from entering their ports and laid heavy duties on our

¹ Williamson, Remarks on the New Plan of Government, printed in State Gazette of North Carolina in 1788; Ford, Essays on the Constitution 393, 401.

² 2 Elliot Deb. 83, 106.

exports to them, and we had no way of retaliating because of the impotence of Congress.

This, then, was the commercial situation when the Constitution was formed. The "retaliating or regulating power," as Bowdoin called it, was granted by universal consent.¹ Of the meaning of this clause, there was in the early days of the Constitution no uncertainty. It included power to pass a navigation act and authorized Congress to levy duties upon foreign imports. Monroe said that

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other."²

Congress was authorized then to regulate foreign and coasting trade and also to regulate trade among the states. It has often been assumed that federal authority over these branches of commerce, being given in the same words and in the same clause, is coextensive. This view is, however, clearly inconsistent with the express provisions of the Constitution and with the general scheme of the instrument.³

The states of the Union are not known to foreign nations. So far as relates to other countries American commerce is necessarily national in character and is conducted under federal authority and protection alone.⁴ In foreign relations the general government stands in the place of and represents every state for every national purpose. It may exercise its control over foreign commerce to retaliate upon an unfriendly nation, or injure an enemy; to influence international negotiations, or to avoid being drawn into unnecessary quarrels. An embargo of foreign commerce may therefore be proper, for the federal government cannot be compelled to grant or to continue its authority and protection.

As to commerce among the states no such considerations arise.⁵ Here the subject is presented solely as between the individual and

¹ Williamson, Remarks on the New Plan of Government, *supra*.

² Message to Congress May 4, 1822. Speech of William H. Crawford in Senate, Feb. 11, 1811. Annals, 11th Cong., 3rd Sess., pl. 139.

³ Prentice & Egan, Commerce Clause 41.

⁴ Lord *v.* Steamship Co., 102 U. S. 541.

⁵ As to difference in purpose see speech of William H. Crawford in Senate, Feb. 11, 1811, *supra*.

state and federal governments. It is not affected by international considerations, nor does the United States in these relations take the place of or represent a state or state laws.

The distinction has been recognized in the administration of government from the very beginning. It has been understood that to make its exclusions effective Congress could forbid or permit foreign commerce and license the coasting trade, but that with these exceptions, transportation across state lines was conducted under state laws, and was an operation which the federal government could neither permit nor forbid. In 1852, when it was sought to extend the coasting laws to ferry boats operating across the Mississippi River between Missouri and Illinois, the court said:

"A license from the United States, and a license from a State cannot both be necessary to do the same thing. . . . A license conveys the right to do the thing or it conveys no right; if it conveys the right to do the thing, then no other or further conveyance from any person can be necessary. A license from the United States to carry on the coasting trade, it is urged, is necessary for a steam ferry-boat. If this be so, then a license from a State would be of no avail, and need not be obtained. The States have exercised the right to license and regulate ferries from the commencement of the government to this day."¹

The doctrine of this case was approved in 1861, by the Supreme Court,² and has not been questioned.

It is therefore well established that a federal license is not required for the conduct of an interstate ferry not engaged in coastwise navigation, and that the possession of such a license does not authorize a vessel to engage in such ferriage in violation of State law.³

In this respect the rule applicable to ferries was in no way exceptional. A ferry is a public highway,—"a continuation of a road," and the rule applied to it was the one applicable to all other carriers. The important fact is that all transportation, when considered as a business in itself and in relation to the carrier, except foreign commerce and the coasting trade, was within state control and beyond federal jurisdiction.⁴

Federal powers over interstate commerce being then small in

¹ *The Steam Ferry Boat*, William Pope, 1 Newb. Adm. 256.

² *Conway v. Taylor's Executor*, 1 Black (U. S.) 603.

³ *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Chilvers v. People*, 11 Mich. 43; *Midland Ferry Co. v. Wilson*, 28 N. J. Eq. 537; *Carroll v. Campbell*, 108 Mo. 550.

⁴ Chief Justice Marshall on Federal Regulation of Interstate Carriers, 5 Col. L. Rev. 77.

extent, very few restrictions were needed. Congress had been given authority to raise revenue by a tariff on foreign commerce. This power was restricted by the rule of uniformity and by the provision that no tax or duty should be laid on articles exported from any state. Congress was given a limited authority over coasting navigation, but had no control over communication by land, or by interior waters. Its power over navigation was restricted by the provisions that no preference should be given to ports of one state over those of another, and that vessels bound to or from one state should not be obliged to enter, clear, or pay duties in another.

Aside from this, the federal power over commerce, Edmund Randolph said,

"extends to little more than to establish the forms of commercial intercourse between the States and to keep the prohibitions which the Constitution imposes upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon entering or clearing of the vessels of one State in the ports of another."¹

So far as concerns commerce among the states, therefore, the rule of the Constitution was free ships, free goods, and, except in the foreign and coasting trade, non-interference with carriers. From these small beginnings the present federal power has developed.

In *Gibbons v. Ogden*,² a case which concerned only the federal power over navigation, the power was declared to be exclusive. In *Brown v. Maryland*³ it was held that a state tax upon the sale of imported goods by the importer in original packages was prohibited not only by the express provisions of the Constitution, but also by the commerce clause.

It is sometimes said that the doctrine commonly called the "original package" rule was first declared in *Brown v. Maryland*.⁴ This is a mistake.⁵ That which was new about this decision was

¹ Opinion on United States Bank bill, Feb. 12, 1791; see *Federalist* No. 42.

² 9 Wheat. (U. S.) 1.

³ 12 Wheat. (U. S.) 445.

⁴ See Judson, *Interstate Commerce* 24, 25.

⁵ The rule was a familiar one when the case was decided. It may be traced to state statutes adopted under the Articles of Confederation: see, for example, Act of N. Y., March 22, 1784, Laws 1777-1784, c. 10, p. 599; Act of April 11, 1787, Laws 1788-1789, c. 81, p. 509. Until 1822 the exemption which was established by the decision in this case had been recognized in the Maryland statutes, Freund, *Police Power* § 81, and the same exemption existed under the statutes of Pennsylvania until 1824; see Act of April 2, 1821, and supplement of March 4, 1824. *Biddle v. Comm.*, 13 S. & R. (Pa.) 405.

not in the announcement of the original package rule, but in the extension of the meaning of the commerce clause. Aside from the prohibition upon taxation of imports and exports, the Constitution, as understood when framed and adopted, imposed no limitations upon the taxing powers of the states.

"The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports."¹

The great importance of *Brown v. Maryland* is that by that decision this construction was definitely disapproved. The holding of the case is in substance that the federal power derived from the commerce clause, being an exclusive power, and including, as Randolph had said, power "to prevent taxes on imports or exports," amounted in effect to an original limitation upon state powers.

The new theory of construction, when adopted, may have seemed of small importance, for the tax then in question was in any event unconstitutional. In the case of the State Freight Tax,² however, its real importance began to appear. The tax there involved was imposed by a state upon every ton of freight carried within its limits. Such a tax, the state authorities considered, was not strictly a tax upon imports or exports. On the other hand, the burden which it imposed upon commercial intercourse among the states was as substantial as it would have been had it fallen within the precise terms of the constitutional prohibition. The Court said:

"It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such a regulation would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one in hand."³

The tax was held invalid because prohibited by the commerce clause. The Court had, but a short time before this decision, held that the words "exports" and "imports" as used in the Constitution refer only to foreign trade.⁴ The clause which was intended

¹ Federalist Nos. 33, 32.

² 15 Wall. (U. S.) 276.

³ 15 Wall. (U. S.) 232.

⁴ *Woodruff v. Parham*, 8 Wall. (U. S.) 123.

to forbid state taxation of interstate as well as foreign trade having thus been so narrowed as to fail of its full purpose, the commerce clause was broadened to take its place, and thus construed was applied so as to operate upon interstate carriers not engaged in the coasting trade.

The rule being established, then, that the states may not tax transportation, the next step was taken in the restriction of state power to regulate freights and fares for interstate transportation, — a jurisdiction which the states had exercised from the earliest times, which the Supreme Court had but few years before declared to be "unrestricted and uncontrolled"¹ and whose exercise had been sustained without question in 1876.² This doctrine was not abandoned hastily, but because, in the language of Mr. Justice Miller, "it is impossible to see any distinction in its effect upon commerce between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation."³

The states being thus deprived of the power to regulate interstate rates, the doctrine has now become current that the Constitution gave this power to Congress. Of course the argument by which the limitation of state jurisdiction was achieved, if good at all, should equally be good as a limitation upon federal power. Congress is forbidden to tax exports from any state; clearly, then, under the rule applied in the case of the State Freight Tax, like the states, it cannot tax transportation from one state to another, and as, in the phrase employed by Mr. Justice Miller in the case of the Wabash Railway, it is impossible to see a distinction in its effect upon commerce between taxation and regulation of rates, therefore the conclusion should have been that Congress is constitutionally unable to regulate interstate rates.

The argument was used, however, only against the states. So far as concerns federal power quite a different argument is used. Congress, it is said, is not expressly given this power, neither is the power expressly denied, and as it no longer exists in the states, it must, so it is said, belong to Congress, — a strange inversion of the principle still taught in the schools for construction of state and federal constitutions.

¹ *Railroad Company v. Maryland*, 21 Wall. (U. S.) 456, 471.

² *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164.

³ *Wabash Railroad Co. v. Illinois*, 118 U. S. 557, 570; reversing *People v. Wabash Railroad Co.*, 104 Ill. 476.

Upon this argument, and upon no other, is based the present claim of federal jurisdiction to regulate freight rates. The power being, then, entirely beyond the design of the Constitution, it is not surprising that its exercise should, as has been shown by Mr. Olney¹ and Mr. Morawetz,² be embarrassed by extraordinary constitutional difficulties.

Federal power has also been extended in other directions so as to prevent state legislation, which would interfere with or burden interstate transportation or trade or obstruct navigation of public waters. The important feature about this history is that the power which was originally given to Congress in order to secure "an unrestrained intercourse between the States"³ has developed under the decisions of the Supreme Court subject to the influence of this constitutional purpose only and with no other end in view. The states have been deprived of power to interfere with the freedom of interstate communication, while on the other hand the power has not been acquired by Congress.

It is still true, as Professor Tucker said, that "the whole Constitution in all of its parts looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade."⁴

The federal power, then, has not developed so as to authorize such legislation over corporations as has lately been proposed, and the nature of the jurisdiction which Congress has acquired over the avenues of interstate trade, does not, in any proper view of the Constitution, authorize it to close those avenues to any person. Further than this: the Constitution contains two express limitations upon Congress which prevent its assumption of these powers.

(1) *The Liberty to engage in Commerce.*

The Fourth Article of the Constitution provides that

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

¹ "Legal Aspects of Congressional Railroad Rate-Making," North Amer. Rev., October, 1905.

² "The Power of Congress to Regulate Railway Rates," 18 HARV. L. REV. 572. See also article by Mr. Blackburn Esterline, "Regulation of Railway Rates by Congress is Impracticable," 39 Am. Law Rev. 517.

³ Federalist, No. 11.

⁴ Tucker, Constitution § 256.

The Fifth Amendment, that

"No person shall . . . be deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment protects the liberty of every person against invasion by state authority. When legislation is proposed which would forbid any person or class of persons to follow ordinary pursuits freely permitted to others, these constitutional provisions must be considered.

It is the singular good fortune of the Constitution that it was founded during that short period when political ideas were those of the completest individual liberty,—"while the jealousy of power was strong and the love of liberty and of right was ardent."¹ "If we examine the present state of the world," James Winthrop said, "we shall find that most of the business is done in the freest states, and that industry decreases in proportion to the rigour of government."² This was not the spirit of the old régime, when industry was a privilege acquired by license from government or by the election of a guild,³ and it may not be the spirit of the new régime, under which organizations not unlike the guilds have arisen, and the revival of governmental license is proposed. Industrial liberty for the modern world was the discovery of the seventeenth and eighteenth centuries, and its security, with all other rights, which together constitute freedom, was the great purpose of American governments.

To this end provisions were inserted in state constitutions, declaring and protecting the inalienable rights of man. No such provisions were inserted in the Federal Constitution, for there they were unnecessary. The liberty of the citizen was protected by the state, not by the United States. This, said Alexander Contee Hanson,⁴ results from the nature of a federal republic, which "consists of an assemblage of distinct states, each completely organized for the protection of its own citizens." The rights of private citizens, James Bowdoin said, are not "the object or subject of the Constitution."⁵

¹ Ruffin, C. J., in *Hoke v. Henderson*, 4 Dev. (N. C.) 33 (1833).

² Letter of James Winthrop (Agrippa) in *Massachusetts Gazette*, Nov. 23, 1787; Ford, *Essays on the Constitution* 53, 55.

³ Lecky, *Democracy and Liberty*, Vol. II. p. 243. See remarks of Senator Hayne of South Carolina, April 30, 1824. *Annals*, 18th Cong., 1st Sess., Vol. I. p. 623.

⁴ "Remarks" published in Ford, *Pamphlets on the Constitution* 221, 241-243.

⁵ 2 Elliot Deb. 87.

The states, then, it was answered, should accept the Constitution upon the express condition that nothing therein deprive a citizen of the rights given to him by the state in which he resides¹ or the Constitution should be amended so as to protect every individual in the enjoyment of rights derived from the states. Such conditional acceptance or amendment was unnecessary, but to satisfy doubts, not to alter the operation of the Constitution² the amendments known as the Bill of Rights were proposed in 1789 and soon after adopted.

By these amendments the provision of the Constitution giving to citizens of each state all the privileges and immunities of citizens of the several states³ was supplemented by a long list of rights not to be infringed, including provisions, not restricted to the protection of citizens, which enact that no person—that is, as the word is construed, no citizen, alien or corporation—shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation;⁴ and that the enumeration of certain rights shall not be construed to deny or disparage others retained by the states or by the people.⁵

What are the privileges, immunities, liberties, and rights of property thus protected? For these expressions, which have a long history in English law, attempts have been made to establish a somewhat technical meaning which would so restrict their operation as only to forbid arbitrary executions, imprisonments, and forfeitures.⁶ This view comes from a partial consideration of the subject. English history and the development of English law centre about the growth of individual liberty. To give to the provisions in the American Constitution which protect individual rights the meaning which they would have had for Norman

¹ See letter by James Winthrop in *Massachusetts Gazette*, Feb. 5, 1788; Ford, *Essays on the Constitution* 119.

² The preamble adopted with these amendments by Congress reads: "The conventions of a number of the States having at the time of adopting the Constitution expressed a desire, in order to prevent misconstruction and abuse of its powers, that further declaratory and restrictive clauses be added; and as extending the grounds of public confidence in the government will best ensure the beneficent ends of its institution, resolved," etc. See Mr. William D. Guthrie, "Constitutionality of the Anti-Trust Act," 11 *HARV. L. REV.* 80, 83.

³ Article IV. § 2.

⁴ Fifth Amendment.

⁵ Ninth Amendment.

⁶ "The Meaning of the Word Liberty," 4 *HARV. L. REV.* 365.

lawyers or for lawyers of the English monarchy, is wholly to misinterpret the purposes of the instrument.

There are, however, authorities which hold that even in early law the word "liberty" referred not merely to freedom from arbitrary imprisonment, but included also industrial liberty so far as it existed. "In a sense all the rights secured by Magna Carta were 'liberties,' but the word is probably used here as an equivalent to 'franchises' embracing feudal jurisdictions, immunities and privileges of various sorts, all treated by medieval law as falling within the category of property."¹ "These words have always been taken to extend to freedom of trade."² From this beginning the growth of civil, religious, and political rights may in part be traced, but liberty comes in part only from England. The American declarations of rights, Professor Jellinek says, "enumerate a much larger number of rights than English declarations, and look upon these rights as innate and inalienable. Whence comes this conception in American law? It is not from the English law."³ Partly, perhaps, consciously or unconsciously, these new rights and new ideas are results of life in the new world. Conditions in America, where every settler had to rely upon himself for safety as well as sustenance, where relations to others were comparatively slight and to government hardly felt, made individual liberty of the widest character a fact of daily experience. Industry as a privilege or as less than an inalienable right would have been a difficult conception to introduce. Moreover, "the men who founded the American republics, state and federal, were not seeking to imitate Great Britain. They set out to establish institutions such as they thought England ought to have, and not those which they found existing."⁴

Much of the discussion of the formative period seems, as is often noticed, to be of French rather than English origin.⁵ That there should have been such an influence seems natural. French and Americans had been allies,—their troops had served in the same armies, men of the two nations had closely associated at the time when the attention of the French nation was absorbed by political

¹ McKechnie, *Magna Carta* 445.

² Parker, C. J., in *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711).

³ Jellinek, *Rights of Man and of Citizens*, Ch. VI.

⁴ Campbell, *The Puritan in Holland, England, and America*, Vol. I. p. 53.

⁵ Morley, *Rousseau*, Introduction; Borgeaud, *Adoption and Amendment of Constitutions* 19.

discussions, and above all by Rousseau.¹ American ideas were carried back to France by the troops who served here;² so that a declaration of the "rights of man" was known as "*une idée américaine*,"³ introducing, in Lafayette's phrase, "the American era."⁴ It would seem inevitable that the current French political discussion should be introduced into America, and that, at the close of the Revolution, many persons in this country, like Aaron Burr,⁵ should be interested in French political theories, and for the same reason, — because introduced to this literature by French friends. It is one of the surprises of American history that the current of influence at this time seems to have flowed in one direction only. America influenced France, but it was not until later that France influenced America.⁶

It is quite possible, however, to trace the rise of the doctrines under whose influence the Constitution was formed, without recourse to France.

The Revolution was not a quarrel between two peoples, but between two parties, — the conservatives in England and America on one side, the liberals in both countries on the other side. In England the party of monarchy was successful. In the colonies

¹ "We have never seen in our generation — indeed the world has not seen more than once or twice in all the course of history — a literature which has exercised such a prodigious influence over the minds of men, over every cast and shade of intellect as that which emanated from Rousseau between 1749 and 1762." Maine, *Ancient Law* 84. Hume, writing from Paris in 1756, said: "It is impossible to express or imagine the enthusiasm of the nation in his favor; . . . no person ever so much engaged their attention as Rousseau." Buckle, *Hist. Civ. Eng.* Vol. II, pp. 330, 331, notes 12, 13.

² Buckle, *Hist. Civ. Eng.* (N. Y. 1894) Vol. II, p. 417, note 211.

³ Dumont, *Souvenirs sur Mirabeau* 97.

⁴ "L'ère de la révolution américaine qu'on peut regarder comme le commencement d'un nouvel ordre social pour le monde entier, est à proprement parler l'ère des déclarations des droits . . . Ce n'est donc qu'après le commencement de l'ère américaine, qu'il a été question de définir indépendamment de tout ordre pre-existant, les droits que la nature a départis à chaque homme, droits tellement inherens à son existence, que le société entière n'a pas le droit de l'on priver." Lafayette, *Memoirs, Correspondances, et Manuscrits* (Bruxelles, 1837), Vol. II, p. 45. Jellinek, "Rights of Man and of Citizens." See the recent discussion of this subject in France, "La Déclaration des Droits de l'Homme et du Citoyen," Emile Walch (Paris, 1903, Henri Jouve); "Montesquieu et J. J. Rousseau" by J. Tschernoff (Paris, 1903, Librairie Marescq Aîné); Boutmy, article in *Annales de l'école libre des sciences politiques*, 1902, p. 414.

⁵ Parton, *Life of Burr*, 1st ed., 132.

⁶ "Rousseau in Philadelphia," by Lewis Rosenthal, 12 *Mag. Am. Hist.* 46; Merriam, *American Political Theories*; Borgeaud, *Adoption and Amendment of Constitutions*; Lee, *Letter of a Federal Farmer*; Ford, *Pamphlets on the Constitution* 290.

democratic institutions were established, and it was for the preservation of these institutions that the war was fought.¹

The political doctrines of America were the doctrines of the Parliamentary party in England, Puritan in character, partly of Calvinistic origin and to this extent like much of Rousseau's speculation, derived from the democracy of Geneva. "The first indications of these religious-political ideas can be traced far back for they were not created by the Reformation. But the practice which developed," in America, "on the basis of these ideas was something unique. For the first time in history social compacts, by which states are founded, were not merely demanded, they were actually concluded."²

Instances of this influence are found in the efforts of Cromwell's army to establish by popular vote an instrument of government superior to the authority of Parliament; and in the statutes adopted in the early days of Rhode Island and Connecticut by general vote of the colonists. The idea from which this practice grew, Borgeaud says, was that to establish government, as to found a congregation, the consent of all concerned was necessary. "When the democratic communities of New England became veritable States, the Puritan conception, taken up and systematized by philosophy, had become the theory of the social contract. Under this new form it presided over the formation and establishment of American constitutions of the Revolutionary period, constitutions whose most perfect expression was that adopted by Massachusetts in 1780. It was by virtue of the formula which Jean Jacques Rousseau has rendered famous, but which the Anglo-Saxons had not learned from him, that this constitution was submitted to all the citizens of the State."³

The political writers who had the greatest influence in forming American opinion, and whose works were most quoted in this country, were Locke and Algernon Sidney. The principles upon which the American Revolution was conducted came largely from them,⁴ and their influence in the constitutional period is strongly marked.

Both of these writers had defined liberty and property as including the right of industry. Locke said:

¹ "The Revolution Impending," by Mellen Chamberlain, in *Narrative and Critical History of America*, Vol. VI. pp. 1, 2.

² Jellinek, *Rights of Man* 61, 62.

³ Borgeaud, *Adoption and Amendment of Constitutions* 138.

⁴ Fiske, *Critical Period* 64.

"Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands are properly his."¹

So Algernon Sidney:

"Property also is an appendage to liberty; and 't is as impossible for a man to have a right to lands or goods, if he has no liberty, and enjoys his life only at the pleasure of another, as it is to enjoy either, when he is deprived of them."²

The American governments were formed when the influence of this philosophy was at its height. James Iredell, afterward Associate Justice of the Supreme Court, said in the Convention of North Carolina that he believed the passion for liberty was stronger in America than in any other country in the world.³ The legislative proceedings of the time justify these statements. "We hold these truths to be self-evident, that all men were created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Of these statements in the Declaration, the Supreme Court has said that while they "may not have the force of organic law, or be made the basis of judicial decision as to the limits of rights and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit; and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."⁴

In state constitutions the doctrines of individual freedom were still more fully declared. The Bill of Rights of Virginia, in 1776, was adopted to secure

"the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

New Hampshire in 1784 and again in 1792 prefaced its Constitution with the statements that

"All men have certain natural, essential and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possess-

¹ Second Treatise on Government, Ch. V. § 27.

² Discourses on Government, Ch. III. § 16; see too Adam Smith, *Wealth of Nations*, Bk. I. Ch. X. Part II.; Thiers, *De la Propriété* 36, 37.

³ 4 Elliot Deb. 95.

⁴ *Gulf, etc., Ry. Co. v. Ellis*, 165 U. S. 150, 159-160.

ing and protecting property,—and in a word of seeking and obtaining happiness.”

Similar expressions are in the constitutions of most of the other states. The Constitution of Missouri some years afterward, instead of referring generally to the right of acquiring and possessing property, includes among the inalienable rights of individuals “life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness,” a phrase which was modified so as to protect individuals in “the enjoyment of the gains of their own industry.” Upon this subject the Constitution of Kentucky still later, in words which recall Lafayette’s expressions,¹ said that “absolute power over the lives, liberty and property of persons exists nowhere in a republic, not even in the largest majority.”

In all these broad phrases law-makers used, not the language of Norman law, but spoke, as Fisher Ames said of the Federal Constitution, in “the language of philosophy.”²

The purpose to secure individual liberty—a controlling purpose of the communities which framed and adopted the Constitution—inheres, then, not only in its preamble, but in the operating provisions by which this purpose was made effective. Among the most important of these provisions are those securing the right of industry. “The right to make contracts,” William H. Crawford said, “is antecedent to and independent of all municipal law.”³ Early in the history of the government the federal courts held that the privileges and immunities of citizenship included “the right of citizens of one State to pass through, or reside in any other State, for the purposes of trade . . . or otherwise.”⁴ In *Gibbons v. Ogden* the Supreme Court, speaking by Mr. Chief Justice Marshall, held that the right of intercourse between state and state was not granted by the Federal Constitution, but “derives its source from those laws whose authority is acknowledged by civilized man throughout the world.”⁵

That is, in other words, the right to engage in interstate commerce is part of the inalienable liberty which, according to the philosophy of that time, has a higher source than the Constitution

¹ *Memoirs, Correspondances et Manuscrits* (Bruxelles, 1837), Vol. II. p. 45.

² 2 Elliot Deb. 155.

³ Speech in Senate, Feb. 20, 1811; *Annals*, 11th Cong., 3d Sess., pl. 340.

⁴ *Corfield v. Coryell*, 4 Wash. C. C. Rep. 371; *Ward v. Maryland*, 12 Wall. (U. S.)

418, 430.

⁵ 9 Wheat. (U. S.) 1, 211.

itself, and whose protection is one of the chief purposes for which government is instituted. Political theories have changed since this decision, but the Constitution remains, and the rights which it was formed to protect still have its assurance.

Under the influence of slavery the meaning of the word "liberty" was much restricted. It proved to be true, for the white as for the black, that the Union could not remain half slave and half free. This narrowing influence is no longer felt, and again liberty is "the greatest of all rights,"¹ including all rights necessary for the maintenance and security of every person, and among others the right to engage in commerce. The Fourteenth Amendment then marks a return to the earlier constitutional views. It "conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty and property that previously existed under all state constitutions."²

Under this amendment liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned,"³ and in so doing to move freely from state to state.⁴ "The right to follow any of the common occupations of life is an inalienable right."⁵

The right to engage in commerce is, then, part of the liberty derived from the states which neither the United States⁶ nor the states⁷ may deny. There is no process of law by which the right may be taken. As the right is derived from state law,⁸ it belongs

¹ *Jacobson v. Massachusetts*, 25 Sup. Ct. Rep. 358, 361.

² *Mobile & Ohio R. R. v. Tennessee*, 153 U. S. 486, 506.

³ *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Pavesich v. New England Life Ins. Co.*, 50 S. E. Rep. 68; *City of Chicago v. Netcher*, 55 N. E. Rep. 707; *Kellyville Coal Co. v. Harrier*, 69 N. E. Rep. 927; *Erdman v. Mitchell*, 56 Atl. Rep. 327; *State v. Dodge*, 56 Atl. Rep. 983; *State v. Ashbrook*, 55 S. W. Rep. 627.

⁴ *Williams v. Fears*, 179 U. S. 270.

⁵ Opinion of Mr. Justice Bradley in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, approved in 165 U. S. 578, 589.

⁶ Fifth Amendment.

⁷ Fourteenth Amendment.

⁸ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Bowman v. Railroad Co.*, 115 U. S. 611; "Origin of the Right to Engage in Interstate Commerce," 17 HARV. L. REV. 20.

to those to whom the state gives it, whether citizen, alien, or corporation. The protection of the Fifth and Fourteenth Amendments belongs to all persons, and cannot be disregarded in respect to those artificial entities called corporations any more than in respect to the individuals who compose them.¹ The right to engage in commerce is a franchise which, being granted by another sovereign, is beyond federal jurisdiction either to prohibit or to tax.² In this matter the authority of the state is complete, and beyond federal control, — a distribution of power which results from the nature of a federal republic, "an assemblage of distinct States, each completely organized for the protection of its own citizens."³

The exercise of this constitutional right, derived from state law, to engage in commerce, is necessarily subject to two limitations. The first of these is, of course, the wide federal jurisdiction in foreign affairs already mentioned. The second limitation is in the power of police regulation, which belongs to Congress, and which has been exercised, for example, in the statutes forbidding transportation of articles which, by the commercial usage of nations, are not legitimate subjects of commerce. Congress, that is, has a discretionary power, within constitutional limits, so to regulate commerce as to accomplish the purposes for which the federal jurisdiction was created. Carriers may be required to give rest, water, and food to live stock; transportation of infected articles may be forbidden, and impediments to intercourse among the states may be removed. In all this legislation, however, there is no question of the person for or by whom commerce is conducted. The subject regulated is that portion of commerce given to Congress, and in the exercise of this power, as in the exercise of its other powers, Congress is subject to all the limitations imposed by the Constitution.⁴ Congress cannot deprive any person of liberty, exclude proper articles from interstate transportation,⁵ nor

¹ *Gulf, Colorado, etc., Co. v. Ellis*, 165 U. S. 150, 154; *United States v. Northwestern Express Co.*, 164 U. S. 686, 689; *Covington, etc., Co. v. Sandford*, 164 U. S. 578, 592; *Coffeyville Vitrified Brick Co. v. Perry*, 76 Pac. Rep. 848; *State v. Missouri Tie Co.*, 80 S. W. Rep. 933.

² *Louisville, etc., Co. v. Kentucky*, 188 U. S. 385; *Pacific Railroad Cases*, 127 U. S. 1, 40.

³ A. C. Hanson, "Remarks" published in Ford, Pamphlets on the Constitution 221, 241-243.

⁴ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336.

⁵ *Ex parte Jackson*, 96 U. S. 727, 735; *In re Rapier*, 143 U. S. 110, 133; Speech of Wm. M. Evarts in Senate, Jan. 13, 1887, Cong. Rec., 49th Cong., 2d Sess., Vol. XVIII Part I. p. 603.

distinguish between proper occupations by reason of the personality of shipper or consignee. Some rights in every free government are beyond control of the state. "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism."¹

The two powers, state and federal, must, in the language of Senator Wells, "keep company," and "every application of . . . power, by the United States, which has a tendency to embarrass or impair the free exercise of the power reserved to the States is unwarranted, and, if done . . . with a view to such a purpose, is the affair of arrogance and usurpation."²

(2) *Taxation of Imports and Exports.*

It has been stated that under the Constitution as originally formed, and for many years administered, Congress had no jurisdiction over transportation from state to state, save as conducted by coastwise navigation.³ Interstate transportation was left to the states, Congress being forbidden to tax articles exported from any state, and the states forbidden to tax imports or exports. The restriction upon the states, Randolph said, Congress might keep "undiminished" in operation by legislation under the commerce clause, but beyond this, federal power did not extend. Congress being then without jurisdiction over carriage among the states, there was no need to provide that it should not tax or prohibit such transportation, for Congress had no power to which such a restriction could apply.

Federal power, then, never extended so far as to enable Congress to close interstate roads; but this defect of power is not all. Beside this, Congress is subject to the express provision forbidding taxation of exports, and this provision should not only prevent taxation of the goods carried, but should forbid taxation of interstate trans-

¹ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 662; Opinion of Justice Beck in *Hanson v. Vernon*, 27 Iowa 28, 73, approved in *State v. Mayor, etc.*, of Des Moines, 103 Iowa 75.

² Senator Wm. H. Wells, of Delaware, April 1, 1816, *Annals*, 14th Cong., 1st Sess., Vol. I. p. 259.

³ Chief Justice Marshall on Federal Regulation of Interstate Carriers, 5 Col. L. Rev. 77; Speech of J. W. Singleton, of Illinois, in House of Representatives, Feb. 4, 1881, *Cong. Rec.*, 46th Cong., 3d Sess., Vol. XI. Part III. Appendix, 74-81.

portation,¹ and as applied to interstate commerce may well be held to prevent federal prohibition.

The rule of the Constitution was free ships and free goods. Congress was, indeed, permitted to tax imports from abroad. It was intended to raise a federal revenue under the Constitution from a tariff upon foreign commerce, but upon commerce among the states no tax could be laid. The Southern States were not interested in the carrying trade, but were vitally interested in preserving access to the markets of the world for their staple products. Their most important market was Europe, and foreign commerce was chiefly considered in the debates, but even then the South contemplated the time when Northern States would be an important market, and the reason for prohibiting federal taxation of exports was, said a member of the Convention, in order that the planter should "receive the true value of his product wherever it may be shipped."²

All this would probably be accepted without question, were it not for the opinion rendered by the Supreme Court in 1868 in the case of *Woodruff v. Parham*.³ This case holds that a state may tax articles brought from other states while still in first hands and original packages. The rule is necessary. Under any other, as the Court said, a "merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed for half a lifetime, and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York."

It would have been sufficient answer to such a claim had the Court applied to this clause the interpretation which is now placed upon the commerce clause in cases involving state taxation, and held that goods can claim no preference from equal burdens by reason of foreign origin or because brought from another state. Adapting the language used in another connection,⁴ it may be said that a provision forbidding taxation of articles brought from other states or countries "does not require that any bounty be given therefor." The Court, however, went further than this and held that the words "imports" and "exports" applied only to foreign

¹ *State Freight Tax Case*, 15 Wall. (U. S.) 232.

² *Williamson in State Gazette of North Carolina*. Ford, *Essays on the Constitution* 393.

³ 8 Wall. (U. S.) 123.

⁴ *Cornell v. Coyne*, 192 U. S. 426.

trade, a rule which has been followed in later cases.¹ "It is not too much to say," Mr. Justice Miller remarked in delivering the opinion of the Court, and referring to the debates of the constitutional period, "that so far as our research has extended, neither the word export, import, nor impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant."²

This decision, from which Mr. Justice Nelson dissented, completely reversed the rule which up to that time had generally been accepted. Mr. Chief Justice Marshall³ and Mr. Justice Story⁴ had both understood the words to include foreign and interstate commerce alike, and the Supreme Court itself, in a decision rendered by Mr. Chief Justice Taney, had so applied them.⁵ In some respects time and experience of the workings of the Constitution give later generations better opportunities for practical understanding of that instrument than were open to its framers, but it is not likely that in 1868 the language of the Constitution could better be understood than in earlier times. The definitions given by Mr. Justice Miller, therefore, have not generally been accepted as convincing.

"Before the adoption of the Constitution, and therefore at the time it was framed, and its phraseology discussed, an article brought from Pennsylvania to North Carolina would have been said to be imported into North Carolina, and a tax on it would have been called an 'import tax.' It is difficult to say by what other name such a tax, if it could be laid, would now be styled."⁶ Members of the Supreme Court have expressed the same view. Mr. Chief Justice Fuller, in a dissenting opinion in which Justices Brewer, Shiras, and Peckham agreed, said that although this provision of the constitution had been restricted in application to exports to a foreign country "it was plainly intended to apply

¹ *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Brown v. Houston*, 114 U. S. 622; *Pittsburg Coal Co. v. State*, 156 U. S. 590; *Fairbank v. United States*, 181 U. S. 283; *Preston v. Finley*, 72 Fed. Rep. 850; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465; *Ex parte Martin*, 7 Nev. 140.

² *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 136.

³ *Brown v. Maryland*, 12 Wheat. (U. S.) 445.

⁴ *Commentaries on the Constitution* § 1016.

⁵ *Almy v. California*, 24 How. (U. S.) 169.

⁶ *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609, 612.

to interstate exportation as well."¹ Notwithstanding these dissenting views, the decisions² indicate that the rule which in *Woodruff v. Parham* was applied to the clause forbidding the states to tax exports and imports, may also be applied to the clause forbidding Congress to tax exports from any state, although this clause is so worded as apparently to exclude such construction. In view of these dissensions the wording of the provision deserves attention.

When a governmental power over imports and exports is discussed, the words naturally refer to the territorial boundaries of the government whose powers are considered. Thus the New York statutes speak of articles manufactured in the city of Hudson "or imported or brought into the said City from any place whatsoever,"³ and similar references are made to importations into the city of Albany,⁴ to exportations from Albany, Saratoga, or Rensselaer counties to points south of Albany,⁵ and to exports from Suffolk, Kings, and Queens counties.⁶ In all these cases the words imports and exports relate to county and municipal boundaries. The English statutes speak of exportations from a particular port, and as so used the word refers to all goods taken out of that port, including those carried in the conduct of the coasting trade to other ports in England.⁷ To prohibit a state in general terms to tax imports or exports would therefore, in the natural meaning of the words, refer to the territorial boundaries of the power thus limited and would forbid taxing articles carried across state lines. A similar restriction upon the power of the federal government would forbid taxing articles carried across national lines. If it were sought to extend this prohibition so as to prevent federal taxation of articles carried across state lines, the wording of the prohibition should be made with specific reference to the boundaries, not of the federal government, but of the states. This in fact is the form of the constitutional limitation upon federal power.

¹ *Champion v. Ames*, 188 U. S. 321.

² *Turpin v. Burgess*, 117 U. S. 504; *Dooley v. United States*, 183 U. S. 151, 154; *Cornell v. Coyne*, 192 U. S. 418, 427; *American Steel & Wire Co. v. Speed*, 192 U. S. 500.

³ Act of January 26, 1793, Laws 1789-1796, c. 22, p. 414.

⁴ Act of April 3, 1790, *ibid.* c. 47, p. 175.

⁵ Act of April 3, 1797, Laws 1797-1800, c. 94, p. 128.

⁶ Act of April 4, 1800, Laws 1797-1800, p. 447.

⁷ *Muller v. Baldwin*, L. R. 9 Q. B. 457; *Barrett v. Stockton, etc., R. Co.*, 2 M. & G. 163; 3 M. & G. 956; 11 Cl. & F. 590.

The states are forbidden in general terms to lay any tax or duty upon imports or exports, while upon the powers of the federal government the limitation is made with express reference to state boundaries. No tax or duty, it is said, shall be laid by Congress "upon articles exported from any State." Here, then, the Constitution in fact used just such a special form of words as the Court in *Woodruff v. Parham* considered appropriate to designate commerce among the states.

Verbal criticism apart, however, it appears that in the common use of the terms, so far as concerned jurisdiction over goods carried across state lines, each state at the time of the formation of the Constitution was foreign to every other.¹ All commerce, then, except that which was entirely within each state, was foreign commerce. In Massachusetts, for example, where several statutes required inspection of lumber shipped "for exportation to foreign markets" or "exported beyond sea," it was enacted on March 16, 1784, that this term "shall be considered and understood to extend to any port or place not within this Commonwealth." This statute does not purport to amend the acts to which it refers, nor to alter their application, but solely to define the terms employed. The word "foreign" was capable of different meanings, of which Massachusetts adopted the broadest. Under this construction even the rule of *Woodruff v. Parham* would apply the constitutional restrictions upon state and federal power to interstate as well as to international commerce. In general, the words "imports" and "exports" when used without express restriction appear in Massachusetts to have included all trade crossing the state line.²

That the Massachusetts rule prevailed also in other states is shown by the construction placed upon the Pennsylvania statute of 1759 for the inspection of lumber.

This statute, after reciting that "the reputation of this province hath been much advanced by the care of the legislature to prevent frauds and abuses in divers commodities of our country produce exported to foreign markets," proceeds to enact among other things "that no merchant . . . shall . . . take or put on board any ship or vessel for exportation out of this province, any staves,

¹ *Commonwealth v. King*, 1 Whart. (Pa.) 448.

² Act of July 11, 1783, *Perpetual Laws*, Vol. I. p. 103; Act of March 31, 1788, *ibid.* p. 415; Act of February 26, 1794, *ibid.* Vol. II. p. 336; Act of February 27, 1795, *ibid.* p. 272.

heading, boards, planks, or lumber" before inspection thereof as provided by the statute.

In *Shuster v. Ash*,¹ decided by the Supreme Court of Pennsylvania in 1824, it was held that this statute, although enacted in avowed contemplation of "foreign markets," applied to a shipment of staves from Philadelphia to Wilmington. The Court said:

"It cannot be denied that the case falls within the words of the law, because, although the proprietaries of Pennsylvania were also proprietaries of the three lower counties of New Castle, Kent and Sussex on the Delaware, and both were under the same governor, yet the legislatures of the province and counties were in the year 1759 totally independent of each other, and so continued until the revolution in 1776, when each became a sovereign independent State. But it is contended, that the intent of the act is explained by the preamble, which is confined to an exportation to *foreign markets*. If the question had rested on the expression *foreign markets*, the defendant would have had much to say for himself, though even then it would not have been far from difficulty. A country governed by the same king would not, strictly speaking, be a *foreign country*. And yet without doubt an exportation to the British West India Islands must have been considered as within the provision of the act, because the principal markets for staves, &c., were in those islands, and yet they were subject to the same king as Pennsylvania. Construing the word *foreign* with greater latitude, it might extend to all countries beyond sea, without considering whether subject to the same sovereign or not, and carrying its signification to its utmost extent, it might include all countries and governments, other than the province of Pennsylvania, wherever situate. The main intent of the act was to make Pennsylvania staves more valuable by keeping up their character in consequence of their quality. The same observation applies to all other articles, which by various laws were made subject to inspection, — such as bread and flour, beef and pork, butter and lard, bark, fish, flaxseed, &c. I have examined all these acts and they are expressed pretty much as the one now under consideration. They prohibit exportation *out of the province*, or (since the revolution) *out of the state*. The words *out of the province* are so plain, that they seem manifestly intended to define the limits beyond which all markets should be deemed *foreign* markets. Unless we adhere to the line prescribed by the act, (the boundary of the province) where are we to stop and what exceptions are we to make? New Jersey is as near to us as Delaware — and Maryland joins both Delaware and Pennsylvania. The counsel for the plaintiff says that none of the old thirteen colonies of Great Britain, which afterwards confederated

¹ 11 S. & R. 90.

and established their independence could be called foreign markets within the meaning of this act of assembly. Now see to what this would lead. Pennsylvania exported large quantities of flour, to the eastward and southward — to Massachusetts and the Carolinas. Was it not of great importance that the character of her staple should be kept up in those markets? And is it not of great importance still? The coasting trade is of immense value. . . .

"So that we shall find, upon reflection, that our ancestors knew what they were doing when they used the words *out of the province*, and this will appear more clearly when we advert to an act passed in the year 1721, 'For the well tanning and currying of leather,' &c. This act declares 'that it shall not be lawful for any person or persons to lade, ship, or carry in any ship or vessel . . . with intent to transport or convey the same to any place or places out of the province except such as may be carried to the province of New Jersey, and counties of New Castle, Kent and Sussex on Delaware' . . . &c. &c. This shows that the legislature considered New Jersey and the counties on Delaware as embraced by the expression out of the province and therefore it was that they expressly excepted them.

"The other colonies pursued in their inspection laws the same policy as Pennsylvania. Each took care of itself, and considered its neighbors *quo ad hoc* as foreigners. The counsel for plaintiff cited the laws of Connecticut with respect to beef and pork. And I have examined the act for the inspection of tobacco passed in Maryland in the year 1763. The words are these "all tobacco which shall be exported out of this province shall be . . . inspected."

This stringent rule which made all states foreign was perhaps not invariable. An exception is suggested by comparing three statutes passed by the state of New York in March, 1787.¹ These statutes are similar in form. The first, after reciting that "butter and hogs lard have become articles of great exportation from this State and it is necessary that the exportation thereof be regulated," makes provision for inspection of butter and lard to be "exported from this State." The second statute² provides for inspection of beef and pork. The third,³ passed on the same day with the second, after reciting that "staves and heading have become articles of considerable exportation from this State, and it is necessary that great care be taken to preserve their reputation at foreign markets," enacts that "no staves or heading shall be exported out of this State to any foreign market, but such as shall be culled . . .", etc.

¹ Act of March 1, 1788, Laws 1785-1788, c. 53, p. 717.

² Act of March 7, 1788, *ibid.* c. 55, p. 719.

³ *Ibid.* c. 56, p. 723.

The difference in the wording of statutes otherwise so much alike appears to indicate that the word "foreign" in this instance was employed to prevent the application of the general terms in the statute to commerce with other states. That the words when used in the New York statutes without such limitation would apply to interstate trade is shown by the Act of March 22, 1784,¹ imposing duties in general terms "on the importation of certain wares and merchandise," but excepting the product "of the United States or any of them." Similar provisions exist in other statutes,² and unless limited the words ordinarily applied to all imports and exports, — foreign or interstate.³

In Connecticut a duty of two pence was imposed "for every gallon of rum imported" into the state. That this general law applied to interstate trade is shown by the fact that an allowance was made for wastage in transit which was fixed at "five per cent. for rum imported directly from the West Indies, and two per cent. for rum imported from the neighboring states."⁴ This law was subsequently amended so that no duty was payable on rum not sold in the state, "provided, nevertheless, that nothing in this Act shall be construed to exempt rum exported out of this State northward by way of Connecticut River," etc.⁵ In other words, Connecticut taxed the traffic of Western Massachusetts, Vermont, and New Hampshire, but did not intend to drive from its ports commerce on its way to New York and Rhode Island.

The same meaning of the words "exports" and "imports" appears in many other statutes, of which but a few need be cited.⁶

The constitutional provision must then have been intended, as was said by Mr. Justice McLean, to prohibit federal taxation of interstate commerce. "A revenue to the general government could never have been contemplated, from any regulation of commerce among the several States. Countervailing duties under the

¹ Laws 1777-1784, c. 10, p. 599.

² Act of April 11, 1787, Laws 1785-1788, c. 81, p. 509; Act of March 12, 1788, *ibid.* c. 72, p. 786.

³ Act of March 16, 1785, Laws 1785-1788, c. 35, p. 66; Act of May 4, 1786, *ibid.* c. 61, p. 320; Act of April 2, 1799, Laws 1797-1800, p. 439.

⁴ Laws 1786, p. 210.

⁵ *Ibid.* p. 326.

⁶ *Connecticut*, Laws 1786, p. 245; Laws 1796, p. 321. *New Hampshire*, Act of June 21, 1785; Laws 1792, p. 313; Act of Dec. 28, 1791; Laws 1797, p. 381. *Virginia*, Act of Dec. 26, 1792; Laws 1803, pp. 241-242, § 3; Act of Dec. 28, 1795; Laws 1803, p. 352; Act of Jan. 27, 1802; Laws 1803, p. 430. *South Carolina*, "Imposts" Act of Dec. 12, 1795.

Confederation were imposed by the different States to such an extent as to endanger the Confederacy. But this cannot be done under the Constitution by Congress, in whom the power to regulate commerce among the States is vested."¹

(3) *The Purpose of Constitutional Construction.*

George Clinton said that in the course of a long life he had found government not to be strengthened by an assumption of doubtful powers. The proposed method of trust regulation is this and more, — an assumption of powers for which there is no precedent, in order to supersede state laws on the subject of state corporations, — a field in which Congress has no jurisdiction whatever.

The question is therefore presented of the purpose of constitutional interpretation. The Supreme Court has often held, in passing upon the validity of state laws, that the courts will look into the operation and effect of a statute to discern its purpose,² and that if laws purporting to be enacted in the exercise of powers belonging to the state have no real or substantial relation to the objects of those powers, it is the duty of the court so to adjudge and thereby give effect to the Constitution.³ The same rule which tests the validity of state legislation determines also the validity of legislation by Congress.

"The propriety of a law in a constitutional light," Hamilton said, "must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to

¹ McLean, J., in *License Cases*, 5 How. (U. S.) 504, 594; Taney, C. J., in *Passenger Cases*, 7 How. (U. S.) 479, 480; Woodbury, J., *ibid.* 549.

² *Henderson v. Mayor, etc., of New York*, 92 U. S. 259, 268; *Railroad Co. v. Husen*, 95 U. S. 472; *Collins v. New Hampshire*, 171 U. S. 30; *Reid v. Colorado*, 23 Sup. Ct. Rep. 92, 97; *Compagnie Française v. State Board of Health*, 22 Sup. Ct. Rep. 811.

³ *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313; *Hennington v. Georgia*, 163 U. S. 299, 303; *Scott v. Donald*, 165 U. S. 58.

this species of tax, which the Constitution plainly supposes to exist in the State governments?"¹

To these illustrations many others may be added. Unless federal powers are limited to the effectuation of constitutional purposes, the authority to raise and support armies may be made a means of controlling municipal elections, and jurisdiction over navigable waters may control appointment or election to state offices,—in short, if Congress "may use a power granted for one purpose, for the accomplishment of another and very different purpose, it is easy to show that a constitution on parchment is worth nothing."² Yet this perversion of powers is the sole method presented to justify the proposed federal control of corporations.

There is no constitutional authority for this method of construction. "Should Congress," said Mr. Chief Justice Marshall, "under the pretext of exercising its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this Court to say that such an act was not the law of the land."³ The federal government was given the powers necessary or proper to enable it to accomplish the purposes for which it was created. The fact that a power could be used both for constitutional and unconstitutional purposes was not a reason for withholding it from the federal government. "No power, of any kind or degree, can be given, but what may be abused; we have, therefore, only to consider whether any particular power is absolutely necessary. If it be, the power must be given, and we must run the risk of the abuse, considering our risk of this evil as one of the conditions of the imperfect state of human nature, where there is no good without the mixture of some evil."⁴

The framers of the Constitution, then, in every instance, granted powers "commensurate to the object" to be attained.⁵

That every power given should, as Algernon Sidney said, be employed "wholly for the accomplishment of the ends for which it was given"⁶ is therefore the one essential principle which applies to every federal jurisdiction. Unless this principle be accepted

¹ Federalist No. 33.

² Senator Hayne, April 30, 1824. *Annals*, 18th Cong., 1st Sess., Vol. I. pl. 648.

³ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Hoke v. Henderson*, 4 Dev. (N. C.) 12.

⁴ Remarks of James Iredell in Convention of North Carolina, 4 Elliot Deb. 95.

⁵ Edmund Randolph in Convention of Virginia, 3 Elliot Deb. 70.

⁶ Discourses on Government, Ch. I. § 1.

"no power could be delegated nor could government of any sort subsist."¹ To those opponents of the Constitution who were not satisfied with this appeal to necessity and to the honesty of government and who insisted that Congress, being the judge of the necessity and propriety of its acts, might pass "any act which it may deem expedient for any . . . purpose," Hanson replied "that every judge in the union, whether of federal or state appointment . . . will have a right to reject any act handed to him as a law, which he may conceive repugnant to the constitution."²

Further security against the perversion of powers to unintended purposes could not be given. Should these principles of constitutional construction now be abandoned, should the Constitution be made as broad as the results which federal powers may accomplish, and then in turn these powers be extended to serve the needs of the new government thus created, it is obvious that the Constitution has ceased to exist.³

No such methods of construction have yet been sanctioned. It is still true, as Hamilton said, that "the propriety of a law in a constitutional sense, must always be determined by the nature of the power upon which it is founded."

It is clear, then, that the Constitutional Convention did not intend to give Congress power to tax or to prohibit commerce among the states, and that the nature of the power upon which it is sought to found such a jurisdiction fails to support it. As Mr. Chief Justice Fuller very forcibly remarked, "under the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves, to the general government, it was undoubtedly in order to form a more perfect union by freeing such commerce from State discrimination, and not to transfer the power of restriction."⁴

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¹ James Bowdoin, Convention of Massachusetts, 2 Elliot Deb. 84-85.

² A. C. Hanson, "Remarks" in Ford, Pamphlets on the Constitution 217, 234.

³ "Every implication of a grant (of power to Congress) is confined to such as are direct and both necessary and proper, in the usual and natural acceptance of the terms, else it leads to unlimited power. Every means becomes in its turn an end, and thus justifies the use of means still more remote, until absolute power is attained." Resolutions of Legislature of South Carolina; adopted Dec. 18, 1840; copied in Cong. Globe, 26th Cong., 2d Sess., p. 123, Jan. 25, 1841.

⁴ *Champion v. Ames*, *supra*.

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RIGHTS OF THE PARTIES TO A CONTRACT OF AFFREIGHTMENT AFTER THE VESSEL HAS BEEN JUSTIFIABLY ABANDONED. — It has long been settled that the sailor who abandons his ship can recover no wages,¹ and that the master who fails to bring his cargo to the port designated can collect no freight² — not even a *pro rata* amount on quasi-contract for bringing the goods part way.³ It is equally well settled that, when the vessel's safety is sufficiently menaced by the perils of the sea, the master may abandon her without incurring liability for breach of contract.⁴ In recent years, however, frequent contentions have arisen regarding the rights of the parties to the contract of affreightment after the vessel has been abandoned and rescued by salvors. In England it was at first held that the contract was entirely ended by the act of abandonment;⁵ but later decisions hold that leaving the vessel under these circumstances is simply a justifiable repudiation of the contract, of which the other party may take advantage, and the courts decline to state what would be ruled if the ship-owner should follow and regain possession from the salvors before the cargo-owner has acted.⁶ Within a few weeks the United States Supreme Court, although not going to the extent of holding the contract at an end, has decided that "the abandonment, at least, gives an irrevocable power to the cargo-owner to decline to be further bound." *The Eliza Lines*, U. S. Sup. Ct., Oct. 30, 1905.

No fault can be found with the result reached in any of the cases examined, for in all of them the owner of the cargo had suffered considerable injury from the act of abandonment; but it is impossible to subscribe to all

¹ *Lewis v. The Elizabeth and Jane*, 1 Ware (U. S.) 41.

² *Post and Russell v. Robertson*, 1 Johns. (N. Y.) 24.

³ See *The Kathleen*, L. R. 4 A. & E. 269.

⁴ *The Arno*, 8 Asp. 5.

⁵ *The Kathleen*, *supra*.

the reasoning they contain and the inferences to be drawn therefrom. It does not seem sound to say that the act of abandonment necessarily ends the contract, or that the first one of the parties who obtains possession of the derelict has the right to elect whether or not the contract shall continue to be binding, or that the cargo-owner may always rescind when the ship has been deserted. The cases are clearly analogous to those of impossibility, danger,⁶ or sickness,⁷ where the party affected is always excused from liability for not going on under the contract, but where the future rights of the parties are dependent, principally, upon the materiality of the breach, though, to a certain extent also, upon the subsequent conduct of the delinquent party. So, here, if the result of an excusable abandonment should be to make the carrying out of the contract a different undertaking from that originally contemplated, neither party would be further bound;⁸ but, if the breach be but a slight one, so that the cargo is not harmed nor its owner injured materially by the delay, and if the master should give prompt notice of his intention to proceed before the cargo-owner has changed his position, he should be allowed to go on, for it is not uncommon for the law to disregard a technical breach or permit a slight one to be cured.⁹ Of course, as a practical matter, the breach will nearly always be material in these instances, but a case can easily be conceived in which the storm unexpectedly subsides and the crew returns to the ship in a few hours. It is sometimes argued that the ship-owner should be allowed to continue, in analogy to the rule in cases of shipwreck, where the goods may even be transferred to another vessel and the freight earned;¹⁰ but that is a different case, for there the crew are involuntarily separated from the vessel without any act of the will, and consequently there is no real abandonment.

LIABILITY OF FOREIGN REAL ESTATE TO COLLATERAL INHERITANCE TAX.—The very general adoption of inheritance and succession taxes has led to a careful examination by the courts of the theory on which they are based. An inheritance tax seems clearly to be not a tax on the property itself, nor on the legatee, but a tax on the privilege of succeeding to property on the death of the owner.¹ The fact that the burden of the tax may ultimately fall on the property, and that the property is sometimes subjected to a lien until the tax is paid, has led some courts to construe the tax as one on the property as well as on the privilege;² but this seems to confuse the nature of the tax with the method of its enforcement. The right to take property by descent or devise is a privilege granted by the law, not a natural right; and the sovereignty which grants it may impose conditions on it.¹ Theoretically, it would seem that the state might revoke this privilege at any time, and make itself the universal legatee of all decedents. Since succession to property is by permission of the sovereign, the permission can relate only to property over which the sovereign has control. A state has absolute dominion over all property within its territorial bounds, and may

⁶ *Lakeman v. Pollard*, 43 Me. 463.

⁷ *Poussard v. Spiers*, 1 Q. B. D. 410.

⁸ *Jackson v. The Union Marine Insurance Co.*, L. R. 10 C. P. 125.

⁹ *Bettini v. Gye*, 1 Q. B. D. 183.

¹⁰ *Shipton v. Thornton*, 9 Ad. & E. 314.

¹ *Magoun v. Illinois, etc., Bank*, 170 U. S. 283.

² *Bittinger's Estate*, 129 Pa. St. 338.

fix rules for its transfer, descent, and devolution.⁸ In the case of personality each state allows the property within its jurisdiction to pass by the law of the state of the decedent's domicile: ⁴ two states, therefore, each grant a privilege, and each, it seems, if it chose, could exact a tax. But in the case of realty, title passes by the *lex rei sitæ*, and that state alone controls the privilege of succession.⁵ Where, however, the testator has directed the sale of his foreign real estate, it has been argued that an equitable conversion is worked, and that therefore the state of his domicile may impose a tax on the proceeds as personality. A recent case before the Supreme Court of Pennsylvania upholds this position, consistently with previous decisions in that jurisdiction. *In re Vanuxem's Estate*, 61 Atl. Rep. 876.

It would seem that the question as to whether a conversion has taken place must be determined by the law of the state where the land is situated, since that state alone has dominion over the property. But if it is determined that there is a conversion, succession will occur by the law of the decedent's domicile, as in the case of other personality.⁶ The latter state may then exact a bounty for the privilege granted by it. An analogous question arises in the case of the interest of a deceased partner in foreign real estate belonging to the partnership, under the English rule that, in the absence of any agreement, partnership realty is *ipso facto* in the view of equity converted into personality.⁷ In such event, the tax has been held valid,⁸ and may be supported on the above reasoning. But if the conversion is not effected by the will itself, but is to be effected only at some future time, it seems that succession will take place by the *lex rei sitæ*, and therefore the state of testator's domicile having granted no privilege can exact no tax. Where, for example, a testator devised foreign real estate to his wife for life, and upon her death directed its sale and the investment of the proceeds, the tax is not imposable by the state of the testator's domicile.⁹ The fact that the proceeds of the sale are subsequently brought within the taxing state gives it no additional power, for the succession takes place at the moment of death, and the character of the property at that time is controlling.¹⁰

CHARITABLE BEQUESTS TO UNINCORPORATED SOCIETIES. — When property is left to an existing, but unincorporated society, whose purposes are not charitable or religious, the beneficiary is commonly held incapable of taking, irrespective of the rule against perpetuities, by reason of its own inherent incapacity to hold legal title; and the bequest or devise fails.¹ But when property is left to a charitable or (where statutes of mortmain do not prevent it) to a religious society, expressly in trust for some religious or charitable purpose, the law is unsettled. By far the greater part of the cases hold such bequests or devises good, relying generally upon the statute of 43 Elizabeth or some of its modern counterparts² which are designed

⁸ *McCormick v. Sullivant*, 10 Wheat. (U. S.) 192.

⁴ See *Matter of Estate of Swift*, 137 N. Y. 77, 86.

⁵ *Matter of Estate of Swift*, *supra*.

⁶ See *Re Stokes*, 62 L. T. 176. But see *Estate of Swift*, *supra*, *contra*.

⁷ St. 53 & 54 Vict. c. 39, §§ 20, 22.

⁸ *Forbes v. Steven*, L. R. 10 Eq. 178; *Re Stokes*, *supra*. But see *Custance v. Bradshaw*, 4 Hare 315.

⁹ *Hale's Estate*, 161 Pa. St. 181.

¹⁰ *Drayton's Appeal*, 61 Pa. St. 172.

¹ *Carrier v. Price*, (1891) 3 Ch. 159.

² St. 43 Eliz. c. 4. Laws of N. Y., c. 46, § 93.

to prevent charitable testamentary trusts from failing, either through indefiniteness of the beneficiaries⁸ or of the trustees.⁴ Some courts hold the trusts valid without any statute, relying, perhaps, on the non-statutory power over charities which was derived by the courts of equity from the king as *parens patriæ*;⁵ though no less an authority than Marshall was of the opinion that such trusts are invalid in the absence of statute, and denied the adequacy of the royal prerogative to mend so grave a defect as the non-incorporation of the designated trustee.⁶

Where property is left, as before, to unincorporated charitable or religious societies, but by a devise or bequest absolute in form, and not expressly providing that it be held in trust, we find the courts using different reasoning, and dividing along different lines. Some say flatly that such gifts are void for lack of any one capable of taking title.⁷ Others declare that the society may take,⁸ and jump the difficulty that, in legal contemplation, the society does not exist, apart from its individual members. Even these courts, however, as a matter of practice, can only decree that the property be turned over to the treasurer, and rely on him for the rest.⁹ Some courts draw a distinction between the power to take money for general purposes and the power to take land, on the ground that there is no practical objection to the former, whereas perpetual succession is requisite for the latter.¹⁰ Still other courts, though admitting that the unincorporated society cannot hold title, give it to the heirs of the testator in trust for the society.¹¹ Most of the courts in this class of cases lay no stress on the charitable nature of the organizations, and argue as though they were concerned with unincorporated clubs or labor unions. It would seem in reason that an absolute devise should be dealt with exactly as if an express trust had been declared, for any bequest to a religious or charitable association is really a bequest in trust for the indefinite class which the association purports to benefit. Certainly the testator can rarely intend the members of the society to be either legal tenants in common for their own private purposes, or co-beneficiaries. Some cases have proceeded on this principle, and although the devise was absolute in form have recognized the applicability of the statutes concerning charitable trusts.¹² The latest case in point, however, has adhered to the distinction. *Fralick v. Lyford*, 107 N. Y. App. Div. 543.

CONSTITUTIONALITY OF DELEGATION OF LEGISLATIVE POWER. — The maxim of Constitutional Law that legislative power may not be delegated is as broad as its boundaries are vague. In applying it courts are reluctant to declare a statute unconstitutional unless clearly repugnant to the Constitution.¹ The cases involving the question in which statutes are upheld

⁸ Board, etc., of Rush Co. v. Dinwiddie, 139 Ind. 128.

⁴ M'Cord v. Ochiltree, 8 Blackf. (Ind.) 15.

⁵ Charles v. Hunnicutt, 5 Call (Va.) 311. Cf. M'Cord v. Ochiltree, *supra*.

⁶ Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. (U. S.) 1.

⁷ Owens v. Missionary, etc., Society, 14 N. Y. 380. Cf. State, etc., Church v. Warren, 28 Ind. 338.

⁸ Ex'rs of Burr v. Smith, 7 Vt. 241.

⁹ Parker v. Cowell, 16 N. H. 149.

¹⁰ Estate of Ticknor, 13 Mich. 44. Cf. Hadden v. Dandy, 51 N. J. Eq. 154.

¹¹ American, etc., Society v. Wetmore, 17 Conn. 181.

¹² West v. Knight, Part 1, Ch. Cas. 134.

¹ *Re Janvrin*, 174 Mass. 514.

divide into three main classes, shading into each other. Under the first it is held that the operation of a law, deemed by the legislators expedient only on the fulfilment of certain conditions, may be made contingent upon such fulfilment by others than the legislators themselves, and the granting of the right to satisfy such conditions is not a delegation of legislative power. Thus, terms of court may be transferred from one town to another on condition that the citizens of the latter provide accommodations.² On the other hand, the question of suffrage for women can probably not depend on the vote of the people at large, for then they would be deciding on the expediency of the law, irrespective of the legislators' judgment.³

The second class includes the cases involving the distinction between administrative and legislative powers. The powers conferred vary so greatly, according as the scope of the statute is large or narrow, that courts find it difficult to draw the line. The cases concern largely the powers of boards and commissions, to which it is desirable to allow breadth of discretion because of their superior fitness to meet conditions in their special field. A usual rule is that the power conferred is proper if it is to determine facts on which the action of the law depends.⁴ Thus, there is little doubt of the power of a school board to select uniform text-books;⁵ it is going further to allow a stock commission to prohibit the sale of milk from any dairy it determines to be unsanitary;⁶ and still further to entrust a board of health with power to decree compulsory vaccination.⁷ Courts have doubtless gone great lengths in these cases in the laudable endeavor to secure to boards and commissions powers which, under modern necessities for specialization, can be efficiently exercised only by means of such agencies.

The third class of cases forms a real exception to the maxim; involving, namely, the principle (recognized from early times) that the delegation of powers of local self-regulation is valid.⁸ Here too the limits have been stretched, and legislative enactments dependent on acceptance by the voters in each locality are generally upheld when relating to matters of local concern.⁹ At present there is litigation in the lower Massachusetts courts regarding delegation to town selectmen, not ordinarily considered a legislative body, of power to pass speed ordinances. A recent Massachusetts decision well illustrates the widening tendency. State fish commissioners were sustained in their action under a statute allowing them to prohibit any discharge of sawdust into a stream if they determined that it occasioned injury to edible fish. *Commonwealth v. Sisson*, 33 Banker & Tradesman 2216 (Mass. Sup. Ct., Oct. 17, 1905). The situation is not essentially different from many in which the action was upheld as merely administrative, but the court unequivocally declares that the power conferred is legislative, but nevertheless allowable, and a parallel is drawn to cases upholding similar powers granted to state boards of health. In these it would seem that state boards were perhaps originally sustained in the exercise of their powers because such powers were allowed local boards, and the latter were considered to come within the local self-government

² *Walton v. Greenwood*, 60 Me. 356.

³ *Re Municipal Suffrage to Women*, 160 Mass. 586.

⁴ *State v. Thompson*, 160 Mo. 333.

⁵ *Leeper v. State*, 103 Tenn. 500.

⁶ *State v. Broadbelt*, 89 Md. 565.

⁷ *Blue v. Beach*, 155 Ind. 121.

⁸ *State ex rel. White v. Barker*, 116 Ia. 96.

⁹ *Wooman v. County of Hudson*, 52 N. J. Law 398.

exception.¹⁰ Possibly the present decision goes further than any other in its language,¹¹ but whether by extension of administrative powers or by analogy with the recognized exception, the trend of the courts is certainly towards the achievement in similar cases of the result reached in the principal case.

RIGHTS OF A LIFE TENANT IN A PRIVATE CEMETERY. — Interests in burial lots may be granted either by a document under seal, or by any other agreement. If there is a conveyance under seal, the vendee obtains either a fee simple¹ or an easement,² according to the tenor of the instrument and the construction of it warranted by circumstances.³ If the sale of a burial lot is by mere oral or written agreement, no freehold estate or easement can have been passed. Although, in such cases, the courts commonly say that a mere license has been acquired,⁴ yet they generally allow to these licenses most of the qualities of easements.⁵ And indeed the true nature of the vendee's interest seems to be that of an equitable right to an easement.⁶ A mere license expires with the death of the licensor; but it is hard to believe that any court of equity would allow graves or gravestones to be interfered with by successors of vendors of burial lots, at least if they took with notice of the graves. The requisites for an equitable enforcement of agreements for easements seem all present in agreements for the sale of burial lots, even where there is no writing, — a complete and sufficient contract the terms of which are mostly established by custom, valuable consideration, and acts of part performance unequivocally referable to the supposed agreement.⁷ The practical result, that the graves are kept permanently undisturbed, is plainly in harmony with common sense and justice.

Where one is only a life tenant of land, however, it is difficult to see how his powers can extend to selling burial lots in fee simple or as easements enforceable either at law or in equity, since a life tenant can neither convey away his land piecemeal nor incumber it with easements. When, however, the land has already been devoted to the business of conducting a private cemetery, considerations of justice and policy would allow the life tenant to continue the business, and consequently to sell burial lots; for otherwise he is likely to receive little beneficial use of the land. The legal basis for such a rule is hard to find. The Supreme Court of the District of Columbia recently attained this result, on the analogy of a life tenant's right to continue the operation of mines and quarries though the corpus of the estate is thereby diminished, or exhausted. *Hill v. Moore*, 33 Wash. L. Rep. 549. The distinction, however, is clear between the mere severance of part of the physical substance of the inheritance by a life tenant with the right to work

¹⁰ See *Brodline v. Revere*, 182 Mass. 598.

¹¹ *Cf. Nelson v. State Board of Health*, 186 Mass. 330.

¹ *Commonwealth v. Mt. Moriah Cemetery Ass'n*, 10 Phil. (Pa.) 385.

² *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503.

³ See *e.g.* in the case of church cemeteries, *Richards v. Northwest, etc., Church*, 32 Barb. (N. Y.) 42; but *contra, In re Brick, etc., Church*, 3 Edw. Ch. (N. Y.) 155.

⁴ *Dwenger v. Geary*, 113 Ind. 106; *Partridge v. First, etc., Church*, 39 Md. 631; *McGuire v. Trustees, etc., of Cathedral*, 54 Hun (N. Y.) 207.

⁵ See *Perley, Mortuary Law* 178.

⁶ *Moreland v. Richardson*, 22 Beav. 596; *Conger v. Treadway*, 50 Hun (N. Y.)

451.
⁷ See *Wiseman v. Lucksinger*, 84 N. Y. 31, 38. See also *Gale, Easements*, 7th ed., 58, 59.

open mines, and an actual incumbrance of the inheritance with easements, or the complete extinguishment, by a conveyance in fee, of the entire estate in the land; yet, since the only alternative appears to be a decision, the practical effect of which is to deprive the life tenant of the beneficial use of the land, perhaps this loose analogy furnishes the best, though an unsatisfactory, avenue of escape from a perplexing problem.

CONSTITUTIONALITY OF A STATE TAX ON MOVABLES SITUATED OUTSIDE THE STATE. — The power of a state to tax persons and things within its confines is limited by the clause of the Constitution, that no person shall be deprived of property without due process of law. In considering what forms of taxation do not violate this clause, two kinds of taxes must be recognized. Imports, inheritance taxes, licenses, etc. are examples of the first class. They are charges imposed by the state upon persons for privileges granted to them.¹ The nature of the second class is entirely different. In levying taxes of this sort, the state is apportioning the expenses of government among all its citizens. Two methods of making this apportionment which satisfy the requirement of due process of law may be suggested. Each person can be called upon to bear a proportion of the expenses of government commensurate to the proportion of benefit he has received from the state. The second method would be to apportion the taxes among the citizens of the state in proportion to their relative abilities to pay them.² A tax upon a person the amount of which is determined by the value of the property he owns within the state is an example of the first method of apportionment, because the best measure of the amount of protection derived from the state is the amount of property owned. A tax on incomes on the other hand exemplifies the tax upon a person in proportion to his ability to pay. Of course these are but rough approximations, but so long as either principle underlies the tax it is valid.

Does a tax upon a person based upon the amount of personal property owned by him outside of the state meet either requirement? Such a tax has been supported by some decisions,³ by the text-writers,⁴ and by long usage; but it has at length been declared unconstitutional by the Supreme Court of the United States. *Union, etc., Company v. Kentucky*, U. S. Sup. Ct., Nov. 13, 1905 (two judges dissenting). This result is the logical outcome of two previous decisions,⁵ and of the proposition (which the court assumes as undeniably settled) that realty without the state cannot be taxed at the domicile of the owner.⁶ Certainly such a tax is not a charge upon a person based upon the amount of protection he derives from the state, for the maxim *mobilia sequuntur personam* has been entirely discredited.⁷ It has been said that, being based upon the wealth of a citizen, it is a tax upon him graduated according to his ability to pay.² This is not, however, a tax upon a person based upon his ability, as compared with the ability of other

¹ Matter of Swift, 137 N. Y. 77, 88; Knowlton v. Moore, 178 U. S. 41, 47.

² See Beale, Foreign Corporations, § 483.

³ Wheaton v. Mickel, etc., May, 63 N. J. L. 525.

⁴ See Wharton, Conflict of Laws, 3d ed., § 80a.

⁵ Louisville, etc., Co. v. Kentucky, 188 U. S. 385; Delaware, etc., Co. v. Pennsylvania, 193 U. S. 341.

⁶ Louisville, etc., Co. v. Kentucky, *supra*, at 398.

⁷ See Hoyt v. Commissioners of Taxes, 23 N. Y. 224.

citizens, to pay, since under it, A who owns one million dollars worth of realty and no personalty escapes taxation, while B who owns one hundred dollars worth of personalty is taxed; — and yet obviously A is more able to pay than is B. If the state can collect a tax of this sort, solely from the owners of personalty lying without the jurisdiction, a tax on red-headed persons to the exclusion of others, being scarcely less arbitrary, would seem to be legal. Taxation is relative; the amount that A pays must bear some fair ratio to the amount that B pays, and as the present case infringes upon this principle, by taxing A without taxing B who is equally able to pay, it is invalid. It might be suggested that, since this form of taxation has been practiced for a long time, it has become sanctioned by law and hence is due process. The court, however, seems properly to have considered that, for the decision of the question at issue, a broader concept of due process of law is required.

“TENTATIVE” TRUSTS IN SAVINGS BANK DEPOSITS. — A trust may be created without consideration either by a transfer of the property to another as trustee,¹ or, since Lord Eldon’s time, by a mere declaration by the owner that he holds the property in trust.² Though a power of revocation may be reserved,³ a trust without such power, when once created, is irrevocable.⁴ These fundamental principles have sometimes been lost sight of by the courts in considering cases of trust deposits in savings banks, a common form of gratuitous trusts. Massachusetts, for example, arbitrarily requires notice to the beneficiary.⁵ New York also appears to depart from principle. By a case decided in that jurisdiction last year, it was held, contrary to previous decisions of the lower court,⁶ that the mere fact that a deposit stands in the depositor’s name as “trustee” for another is not ground for holding that an irrevocable trust was created, but establishes the creation of a “tentative” trust merely, revocable by the depositor in his lifetime.⁷ As a question of evidence, the decision is not unreasonable, for in view of the common practice of making deposits in the form of trust accounts to evade some rule of the bank,⁸ it is perhaps unsafe to find from the mere form of deposit an actual intent to create a trust; and if such intent is not found, no trust should be held created.⁹ But the decision strikes deeper than that; it assumes that a trust was created, but treats it as revocable. Moreover, the court says that if the depositor dies without having revoked the trust, the presumption arises that an absolute trust was created as to the balance on hand at his death. Much can be said, it is true, in favor of the result of the decision, for it gives effect to the intention with which such deposits are commonly made by the humbler class, namely, to enjoy full

¹ Van Cott v. Prentice, 104 N. Y. 45. See also Ames, Cases on Trusts, 2d ed., 233 n.

² Ex parte Pye, 18 Ves. 140.

³ Perry, Trusts, 5th ed., § 104. See also Ames, Cases on Trusts, 2d ed., 233 n.

⁴ See Dickerson’s Appeal, 115 Pa. St. 198, 210.

⁵ Clark v. Clark, 108 Mass. 522.

⁶ Robertson v. McCarthy, 66 N. Y. Supp. 327; Jenkins v. Baker, 78 N. Y. Supp. 1074.

⁷ Matter of Totten, 179 N. Y. 112.

⁸ As a rule limiting individual deposits, or giving a higher rate of interest on small deposits. See Brabrook v. Boston Bank, 104 Mass. 228; Weber v. Weber, 9 Daly (N. Y.) 211.

⁹ Brabrook v. Boston Bank, *supra*.

ownership of the money during life, but to secure its passage to the named beneficiary upon death. While it may be possible to effect this intention without violating fundamental principles, it is not clear that the New York decision is based upon the correct theory. The transaction must plainly be taken as a present trust if anything, else we meet two difficulties: first, that we are allowing what is in substance a testamentary disposition in irregular form,¹⁰ and second, that equity will not enforce an incomplete voluntary trust.¹¹ To call it a present trust and still effectuate the depositor's intention can only be done, perhaps with some effort, by finding a power of revocation impliedly reserved to the depositor, who, while the trust remains unrevoked, is trustee for himself for life, with full power of disposal, remainder to the named beneficiary. This theory, however, admittedly somewhat over-nice, does not seem to be the one the court proceeds upon, the apparent reasoning being that a trust of this kind is in its nature revocable during life, but made absolute by death. The idea of death perfecting the trust is clearly indefensible, for the trust if ever created was created at the time the deposit was made, and the sole question is whether the depositor then intended to create a trust of the complex character described.

That the doctrine of tentative trusts will grow by application to analogous cases is shown by a recent New York decision, *Lattan v. Van Ness*, 95 N. Y. Supp. 97, which held merely tentative a trust created by transfer of the deposit and the bank book to another as trustee for a third party. Unless this decision can be rested on a similar theory to that suggested above, it would seem a greater departure from principle than the earlier case, for the irrevocability of a trust created in this way was established much earlier and with a sounder basis than that created by mere declaration.

EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DEFECTIVE PERFORMANCE.

—A question constantly arising under a contract of sale is whether acceptance of a tender of goods differing from the terms of the contract as to quality, quantity, time or place of delivery prevents a recovery of damages for the imperfect performance. If an express warranty of quality accompanying the sale has been broken, courts generally are agreed that a right of action survives acceptance.¹ But there is confusion in cases of implied warranties. Cases of this kind arise most frequently in reference to the merchantable quality of goods. The weight of authority is that mere acceptance does not prevent the buyer from afterward recovering for breach of promise, either by a separate action, or by counter-claim in an action brought by the seller.² Some courts, however, hold that such acceptance precludes any claim for defective performance.³ On a similar question as to time of delivery, the Kentucky court recently stood evenly divided as to whether the buyer waived any cause of action for delay. *Lucile Min. Co. v. Fairbanks, Morse & Co.*, 87 S. W. Rep. 1121.

Though most courts in this class of cases, as in cases where inferior goods have been delivered, hold that mere acceptance does not prevent the buyer

¹⁰ See *Nicklas v. Parker*, 61 Atl. Rep. 267 (N. J.).

¹¹ See *Bartlett v. Remington*, 59 N. H. 364.

¹ See Mechem, Sales, 1st ed., § 1395.

² *English v. Spokane Commission Co.*, 57 Fed. Rep. 451. See Williston's Cases on Sales, 2d ed., 779, note 1.

³ *Studer v. Bleistein*, 115 N. Y. 316. See 16 HARV. L. REV. 465, 468.

from suing for delay,⁴ there is considerable authority to the contrary, on the ground that he has waived his right.⁵

If by "waiver" these courts mean a gratuitous renunciation of a cause of action, once accrued, the cases cannot be supported, for such waiver is really a release, and to be binding must be founded on consideration;⁶ though waiver of a defence need not be.⁷ The term "waiver" is, however, used loosely in the cases, and it would be unfair to infer that courts always mean to allow a gratuitous release of a cause of action, for it is often possible to find consideration. The seller, after having broken his promise, is not bound to make a subsequent tender, so that such tender, being a legal detriment, may constitute the consideration for an accord. By this use of the term "waiver," then, courts may be taken to mean a contract to waive or, more accurately, an accord and satisfaction. Viewed in this way, the question becomes mainly one of fact, whether the parties actually made this new agreement. It should be clear that, when the buyer explicitly states that the subsequent tender is not taken as satisfaction, no new agreement can be found.⁸ On the other hand, it should be equally clear that when the seller states or his conduct implies that the tender is an offer to an accord, the acceptance completes an accord and satisfaction which precludes the buyer from claiming damages for defective performance. The main conflict in the decisions is when neither party has said anything. In such a case it is difficult to find mutual assent to the new agreement. It seems more natural to suppose that the seller's late tender is an attempt to carry out the original contract to the best of his ability. His action, therefore, amounts to a waiver on his part of his right not to be compelled to make a late tender, which, as it is not a release of a cause of action, obviously requires no consideration. All doubts should be construed in favor of the buyer, since the seller alone has been at fault. Whenever, accordingly, tender and acceptance are made without explanation on either side, it may well be ruled, as a matter of law, that there is no evidence upon which a jury could find that the seller had satisfied the burden of proving an accord and satisfaction.

RECENT CASES.

ADMIRALTY — TORTS — LIABILITY OF SHIP FOR WILFUL TORT OF SEAMAN. — One of the crew of a steam-tug, acting outside the scope of his employment, wilfully blew off steam and hot water from the boiler so as to deluge the side of another tug. *Held*, that the former vessel is liable for the damage done. *The Bulley*, 138 Fed. Rep. 170 (Dist. Ct., S. D., N. Y.).

At common law, a master is liable only for those wilful acts of his servants which are done within the scope of their employment. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. And in admiralty by the English rule, it is doubtful whether the vessel can be proceeded against where the owner would not be personally

⁴ *Redlands Orange Growers' Ass'n v. Gorman*, 161 Mo. 203. See *Garfield & Proctor Coal Co. v. Fitchburg R. R. Co.*, 166 Mass. 119.

⁵ *Roby v. Reynolds*, 72 N. Y. 487; *Minneapolis Threshing Machine Co. v. Hutchins*, 65 Minn. 89.

⁶ See *Anson, Contracts*, 10th ed., 334; 18 HARV. L. REV. 365.

⁷ *Sigourney v. Wetherell*, 6 Met. (Mass.) 553; *Uhler v. Farmers' National Bank*, 64 Pa. St. 406.

⁸ *Jones v. National Printing Co.*, 13 Daly (N. Y.) 92.

liable. *The Druid*, 1 Wm. Rob. 391, 399; see also CARVER, CARRIAGE BY SEA, 4th ed., § 707. In America, however, the vessel is liable regardless of the personal responsibility of the owner, on the theory that the vessel itself is the wrongdoer. *United States v. Brig Malek Adhel*, 2 How. (U. S.) 210, 233; *The China*, 7 Wall. (U. S.) 53, 68. But if the vessel itself is not the instrument in the wrongdoing, there seems no ground for holding it liable as the offender; and in such a case, therefore, our courts would probably follow an English decision that where the crew of one vessel cut the cable of another alongside, the former vessel was not liable. *Currie v. M'Knight*, [1897] A. C. 97. Whether the vessel is the instrument may often be difficult to determine; and perhaps no more definite test can be laid down than that it may be so regarded, whenever the vessel itself or any integral part thereof is employed in the wrongdoing. Here the vessel seems clearly the instrument, so that the general American doctrine applies.

AGENCY — CREATION OF AGENCY — WHETHER SPECIAL POLICE OFFICER IS AGENT OF EMPLOYER. — The charter of New York City provided that the police board might, on application, appoint special patrolmen to be paid by the applicant, but to be subject to the orders of the chief of police, and to "possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen." A special patrolman, appointed under this provision on the application of the defendant, arrested the plaintiff. *Held*, that, in an action for false imprisonment, the defendant is not liable for the arrest, as he did not specifically request it. *Samuel v. Wanamaker*, 107 N. Y. App. Div. 433.

This question arises on statutes usually falling into one of two classes. The first class, for instance, makes the conductors or station agents of railroads, by virtue of their positions as employees, conservators of the peace, with power and duty to arrest disorderly persons on trains or in stations. The second class is typified by the statute in the present case. In the former class it seems that the employee is not actually made an officer of the state, but rather that the powers of the railroad are increased to better enable it to perform its duties as a common carrier. The railroad, therefore, is held liable for the misuse of this authority. *King v. Illinois Central Rd. Co.*, 69 Miss. 245. But in the principal case it is clear that the special patrolman was an officer of the state, acting as a member of the police force, and that the defendant would have no power to restrain him from performing his duty. *Cf. Sharp v. Erie Rd. Co.*, 90 N. Y. App. Div. 502. That he was paid by the defendant is not material. *Woodhull v. Mayor, etc., of Brooklyn*, 150 N. Y. 450. The patrolman could not be the servant of the defendant while performing acts as an officer of the state. *Railway Co. v. Hackett*, 58 Ark. 381.

ATTACHMENT — OF REALTY — EFFECT. — The plaintiff, having brought an action in a federal court, attached certain realty of the defendant. Later, a receiver under state insolvency proceedings against the defendant took possession of the property, and instituted proceedings in the state court to enjoin the federal marshal from interfering therewith. The plaintiff moved the federal court to enjoin the action of the receiver. *Held*, that the motion must be denied. *Ingraham v. National Salt Co.*, 139 Fed. Rep. 684 (Circ. Ct., E. D., N. Y.).

It is generally recognized that comity forbids interference by one court of concurrent jurisdiction with property in the "possession" of another. *Buck v. Colbath*, 3 Wall. (U. S.) 334. The case under consideration turns on the question whether such "possession" is obtained by the attachment of realty. The court holds that it is not; and this result is supported by another circuit court decision. *Re Hall & Stilson Co.*, 73 Fed. Rep. 527. But it is as squarely opposed by a holding and a strong dictum in circuit courts of appeal. *Gates v. Bucki*, 53 Fed. Rep. 961; *Southern, etc., Co. v. Folsom*, 75 Fed. Rep. 929. Though the federal authorities are divided there are several state dicta to the effect that there is no possession in a court by virtue of the attachment of realty. *Scott v. Manchester Print Works*, 44 N. H. 507. It is true that in the case of personalty attached and corporeally taken into the possession of an

officer, an attempt by another court to take custody of the same goods would precipitate an unseemly physical struggle. Yet no such result need follow in the case of realty where actual possession is never taken on attachment. Therefore the policy of the rule of non-interference does not apply.

ATTORNEYS — COMPENSATION AND LIEN — LIEN ON FUND RECOVERED FOR PERSON OTHER THAN CLIENT. — Minority stockholders of a corporation brought action against certain directors, with whom the corporation was joined as defendant, to recover dividends wrongfully paid. After commencement of the action, but before trial, the defendant directors repaid to the corporation the full amount claimed. *Held*, that the plaintiffs' attorneys are not entitled to have their claim for compensation declared a lien thereon. *Matter of Meighan*, 106 N. Y. App. Div. 599.

The New York Code of Civil Procedure, § 66, gives an attorney a lien upon his client's cause of action that cannot be affected by any settlement between the parties before judgment. But here the attorneys were not retained by the corporation; and the general rule is that an attorney must look to his client alone for his fee, not to other persons who may be benefited by the action. *Scott v. Dailey*, 89 Ind. 477. It is true that the minority stockholders merely set the judicial machinery in motion, and that in effect the action is that of the corporation. *POM. EQ. JUR.*, 3d ed., § 1095. And doubtless they should be given the right of reimbursement for reasonable attorney's fees from the fund recovered in an action which the corporation should have brought. *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48; and see *Trustees v. Greenough*, 105 U. S. 527. But the attorneys should look to their clients for remuneration, and not be given a direct lien on this fund. If the minority stockholders had agreed that their attorneys should have one-quarter of the judgment recovered, no one would maintain that the attorneys would have a lien for this amount against the fund paid to the corporation. There is, however, direct authority against this decision. *Grant v. Lookout Mountain Co.*, 93 Tenn. 691; *Central Rd., etc., of Georgia v. Pettus*, 113 U. S. 116, 124.

ATTORNEYS — COMPENSATION AND LIEN — PRIORITY OVER RIGHT OF SET-OFF. — The defendant had obtained a judgment against the plaintiff for costs. In the same cause of action, though upon an independent appeal in a different court, the plaintiff secured a judgment against the defendant upon which her attorney claimed a lien for disbursements. The defendant's motion to set off his judgment against the plaintiff's judgment was denied. The defendant appealed. *Held*, that the attorney's lien has priority over the right of set-off. *Smith v. Cayuga Lake Cement Co.*, 107 N. Y. App. Div. 524.

The conflict in England on this question between the courts of Common Pleas and the King's Bench was finally settled after the Judicature Acts of 1873 in favor of the equitable rule that the attorney's lien is subject to a set-off. See *JONES, LAW OF LIENS*, 2d ed., § 215. There is a singular conflict in this country. If the client has assigned the judgment to his attorney before an attempt at set off has been made, the attorney's right will defeat the set-off. *Ripley v. Bull*, 19 Conn. 53; *contra*, *Fitzhugh v. McKinney*, 43 Fed. Rep. 461. But if no such assignment has been made, the courts are about evenly divided as to whether the lien is prior. The New York court has already allowed the lien to prevail when the judgments were rendered in separate actions although between the same parties. This court now applies the rule where the judgments are rendered in the same action. The attorney's lien is a derivative claim depending upon the interest of his client in the judgment. If this interest is in the hands of the client is subject to an existing right of set-off, logically it is difficult to see how the attorney has a greater right. *Cf. National Bank of Winterset v. Eyre*, 8 Fed. Rep. 733.

BANKRUPTCY — PREFERENCES — GIVING POSSESSION UNDER A PRIOR BILL OF SALE. — More than four months before bankruptcy, A gave B a bill of sale of her stock in trade as security for a loan, but the bill of sale was not

recorded, nor did B take possession. Within four months of bankruptcy proceedings, A gave B possession of the goods under the bill of sale, being at that time, as B had reasonable ground to believe, insolvent. *Held*, that the transaction does not constitute a preference. *Christ v. Zehner*, 61 Atl. Rep. 822 (Pa.).

For a discussion of the principles involved, see 18 HARV. L. REV. 606.

BANKRUPTCY — PREFERENCES — SECURED CREDITORS. — A contract for a sewer, let in September, 1903, by a municipal corporation, provided for withholding ten per cent of the monthly payments, and gave the corporation's engineer authority to order direct payment by the city to firms supplying machinery to the contractor, if there was reasonable cause to believe he was unduly delaying payment. In October, 1904, the contractor was adjudicated bankrupt on his own petition. The engineer thereafter directed payment to a machinery firm. *Held*, that the power conferred on the engineer is not annulled by the contractor's bankruptcy, and the trustee in bankruptcy cannot prevent payment by the city. *In re Wilkinson*, [1905] 2 K. B. 713.

The English Bankruptcy Act makes voidable payments or transfers of property by the bankrupt during three months prior to bankruptcy proceedings, if a preference was intended. 46 & 47 Vict. c. 52, § 48. Had the contract in the present case been made during the statutory period, it could have been avoided by the trustee, if the intent to prefer existed. Or if the consideration for the contract had been given by the bankrupt within the three months, there would also have been a preference except in jurisdictions where a transfer is valid if contracted for before the statutory period. See *Marvin v. Bushnell*, 36 Conn. 353. But in the present case, before this period began, the bankrupt had performed his part of the contract, and sufficient funds had been retained by the corporation from which to make payment. One creditor got a priority after bankruptcy, but it was not caused by an act of the bankrupt done within the statutory period by himself or through an agent. He transferred his property before the time when the trustee can set his transactions aside on the ground of preference. There was no fraud, for sufficient consideration was received.

BILLS AND NOTES — CHECKS — RIGHT OF SET-OFF BY DRAWER OF DISHONORED CERTIFIED CHECK. — The drawer of a check had it certified before delivery to the payee. Before it was presented, the bank stopped payment and the check was dishonored. The drawer recovered the check from the payee upon paying its face value. *Held*, that the payee is the bank's creditor at the time of insolvency, and the drawer, who becomes a creditor afterwards, cannot set off the amount of the check against his indebtedness to the bank. One justice dissented. *Schlesinger v. Kurzrok*, 94 N. Y. Supp. 442.

A bank, by certifying a check, puts itself in the position of the acceptor of a bill of exchange and becomes primarily liable to the holder. *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; N. Y. Neg. Inst. Law, § 323. But the position of the court is not sound in considering the drawer in the present case as a mere outsider acquiring a claim against the bank after its insolvency. The drawer of a check who has it certified before delivery to the payee, is still liable to the holder. *Minot v. Russ*, 156 Mass. 458. He is not liable on the original debt, however, for the payee surrenders his direct claim against the drawer for a direct claim against the bank and a secondary claim against the drawer. The cases show that the drawer's liability is the same as that of the drawer of a bill of exchange. He is surety for the acceptor and liable only after the acceptor defaults. A surety can set off his payments made in behalf of the principal against his indebtedness to the principal, even though such payments are made after the latter's insolvency. *Cosgrove v. McKasy*, 65 Minn. 426. The minority opinion, therefore, seems to be correct.

BILLS AND NOTES — DEFENSES — NOTICE TO INDORSER. — The holder of a promissory note, excused under the Negotiable Instruments Law from presentment for payment because of the death of the maker and the non-appointment of a personal representative, brought an action against the indorser. *Held*,

that the holder is not also excused from giving notice of dishonor to the indorser. *Reed v. Spear*, 107 N. Y. App. Div. 144.

At common law when no place of payment was specified, before the indorser could be charged, presentment had to be made to the personal representative of a deceased maker, or if none had been appointed, at the maker's house. *Price v. Young*, 1 Nott & M. (S. C.) 438. In no case did the death of the maker dispense with the necessity for notice of dishonor to the indorser. *Oriental Bank v. Blake*, 22 Pick. (Mass.) 206. By the Negotiable Instruments Law, adopted in New York, presentment otherwise than to the deceased maker's personal representative is excused. L. 1897, c. 612, §§ 136, 142. But when presentment is thus excused the instrument is regarded as dishonored by non-payment just as though payment had been refused. *Ibid.* § 143. So although there is no express provision covering this point, yet as the common law rule that notice of dishonor must be given the indorser is embodied in the Negotiable Instruments Law, §§ 160, 186, with certain exceptions not applicable here, the present decision is undoubtedly a sound construction of that law.

BILLS OF PEACE — BILL BY ASSIGNEE OF A CORPORATION FOR UNPAID STOCK SUBSCRIPTIONS. — *Held*, that the assignee of an insolvent corporation may join its stockholders in a single bill in equity to recover the unpaid balances of their stock subscriptions, although no accounting is necessary since it will require all unpaid subscriptions to pay the debts. *Cook v. Carpenter, Appeal of Lipper*, 61 Atl. Rep. 799 (Pa.).

Although it is commonly said that equity will take jurisdiction to prevent a multiplicity of suits, the cases are not harmonious as to the precise limits of the doctrine. Most authorities require that there must appear at least a question common to all the actions. *Hale v. Allinson*, 188 U. S. 56. And such seems to be the law in Pennsylvania. *Young's Appeal*, 3 Penny. (Pa.) 463; *Proprietors' School Fund v. Heermans*, 1 Kulp (Pa.) 469; but cf. *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. 218. Nor is it sufficient that the separate rights arose in connection with the same general transaction. *The Lehigh Valley R. R. Co. v. McFarlan*, 30 N. J. Eq. 135, 31 N. J. Eq. 730. Thus, bills have been allowed by a creditor or receiver against stockholders to determine such common questions as the necessity for a call, or the amount of assessment when stockholders' liability is limited. See *Pfohl v. Simpson*, 74 N. Y. 137. In the rare instances in which pecuniary relief has been granted in this form of action in equity, the various claims appear to have been for liquidated amounts. See *The German, etc., Ins. Co. v. Van Cleave*, 191 Ill. 410. Since in the principal case the obligations are upon separate contracts and no common controversy of law or fact is disclosed, the equity of the bill must be in avoiding many suits for liquidated claims. But it seems that the legal remedies for such claims are not yet considered inadequate. Cf. *Hale v. Allinson*, *supra*, 102 Fed. Rep. 790, 793.

CEMETERIES — LIFE TENANT'S RIGHT TO GRANT BURIAL PERMITS. — The owner of a tract of land, on which he had conducted a private cemetery, deeded it to trustees for the use of his wife for life. *Held*, that the life tenant has the right to continue granting burial permits, which confer a permanent right to the use of the soil for the purposes of graves. *Hill v. Moore*, 33 Wash. L. Rep. 549 (D. C., Sup. Ct.). See NOTES, p. 205.

CHARITIES — BEQUESTS — TO UNINCORPORATED SOCIETIES. — A testator made a bequest to an unincorporated Spiritualist society "to be used by said society in such manner as it may deem most expedient for the development and advancement of spiritualism at Freeville, Tompkins County, N. Y." *Held*, that the gift fails. *Fralick v. Lyford*, 107 N. Y. App. Div. 543. See NOTES, p. 202.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — INTERPRETATION BY SUPREME COURT. — Under a constitutional provision which invested the legislature with full power to correct abuses by public service companies, the legislature passed a law empowering municipalities to fix a maximum water

rate, with the provision that this should in no case interfere with existing contracts. The Supreme Court of Florida decided that the constitutional power conferred upon the legislature could be exercised only in its entirety and that the exception regarding existing contracts was void. *Held*, that this interpretation of the state constitution was a possible one and that the United States Supreme Court would not interfere. *The Tampa Water Works Co. v. The City of Tampa*, U. S. Sup. Ct., Nov. 13, 1905.

The only question before the Supreme Court was whether the interpretation which the Florida court put upon the constitutional clause in deciding that it meant that the legislature must exercise its full power, if any, was so unreasonable that it should be reversed. Ordinarily, when a legislative body is expressly invested with full power, the part which it refrains from exercising is inoperative. *McIntire v. Wood*, 7 Cranch (U. S.) 504. Hence, on a fair interpretation of the constitutional clause, the conclusion of the Florida court was wrong and, as a matter of strict logic, should have been overruled. But, in view of the very numerous instances in which the Supreme Court has refused to reverse questionable decisions of state courts on the ground that such decisions represent a possible view of the contention, the Supreme Court reluctantly declined to overrule the state decision. This case, therefore, illustrates the length to which the Supreme Court will go in sustaining a decision of a state court.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — A statute provided that fish commissioners might prohibit any discharge of sawdust into a stream if they determined that it occasioned injury to edible fish. *Held*, that this is a delegation of legislative power, but is not unconstitutional. *Commonwealth v. Sisson*, 33 Banker & Tradesman 2216 (Mass., Sup. Ct., Oct. 17, 1905). See NOTES, p. 203.

CONTRACTS — CONSTRUCTION — IMPLIED PROMISE TO FURNISH REASONABLE AMOUNT OF WORK. — Without notice to its employees, the defendant company shut down. The plaintiff, one of the employees thereby thrown out of work, brought suit against the company, claiming damages under his contract for piece work. *Held*, that the plaintiff can recover, since the contract of employment contained an implied promise to furnish a reasonable amount of work. *Devonald v. Rosser*, 93 L. T. R. 274 (Eng., K. B., June 6, 1905).

For a consideration of the principles involved, see 19 HARV. L. REV. 133.

CONTRACTS OF AFFREIGHTMENT — FREIGHT — JUSTIFIABLE ABANDONMENT OF SHIP. — The owners of a vessel contracted to carry a cargo of lumber from Pensacola to Montevideo, freight payable on delivery at the port of destination. The ship encountered heavy gales and was justifiably abandoned. The derelict was brought by salvors to Boston, where both ship-owner and cargo-owner applied for possession of the cargo, which, however, was later sold under an order of court upon allegation that it was diminishing in value. The ship-owner filed a libel for freight on the ground that he was ready and willing to go on with the contract, but had been prevented. *Held*, that he can not recover. *The Eliza Lines*, U. S. Sup. Ct., Oct. 30, 1905. See NOTES, p. 200.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — POWER OF WATER COMPANY TO MORTGAGE FRANCHISE IN NATURE OF EASEMENT. — A water company, having a franchise to maintain pipes in the streets of a city to supply the city with water, mortgaged all its property and franchises. *Held*, that the franchise constitutes an easement which may be mortgaged and which cannot be taken away from the mortgagee by a decree against the company annulling the franchise, entered in a suit begun after the mortgage was given and in which the mortgagee was not joined. *Farmers' Loan & Trust Co. v. Meridian Waterworks Co.*, 139 Fed. Rep. 661 (Circ. Ct., S. D., Miss.).

Power to mortgage its property is, generally, an implied power of a corporation. *Aurora Agricultural Society v. Paddock*, 80 Ill. 263. Such power is, however, by the weight of authority, denied to corporations undertaking a

public duty, on the ground that the corporation might thereby disable itself from performing that duty. *Commonwealth v. Smith*, 10 Allen (Mass.) 448. By the weight of authority, also, the franchises of a corporation (other than the franchise to be a corporation, which is clearly inalienable) may not be mortgaged without legislative consent. *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43; *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609. The case discussed illustrates two tendencies: first, to restrict the old rule forbidding public corporations to mortgage, such restrictions being either by statute or by the action of courts in confining the rule to corporations given the power of eminent domain or exclusive rights; and secondly, the tendency to hold franchises of this nature transferable. See *Hunt & Bro. v. Memphis Gaslight Co.*, 95 Tenn. 136; *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501. The doctrine restricting the alienation of corporate property and franchises had its birth in the days when corporations were commonly created by special act and when they might truly be said to have a personal duty to the state in respect to the privileges granted to them specially. As to-day the creation of corporations by special legislation is exceptional, the reason for the old rule has passed away, and the rule itself may well be abandoned.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — RIGHTS OF NON-RESIDENT ALIENS. — A statute authorized an administrator to maintain an action "for the benefit of the decedent's husband or wife, and next of kin," to recover for pecuniary injuries resulting to such persons from a wrongful act causing the decedent's death, against a defendant who "would have been liable to an action in favor of the decedent . . . if death had not ensued." The plaintiff sued the defendant, whose negligence caused the death of the plaintiff's intestate, in behalf of the widow and next of kin, who were non-resident aliens. *Held*, that the plaintiff can recover. *Alfson v. The Bush Co., Lim.*, 182 N. Y. 393.

The legislation of most states, including New York, creating liability for death by wrongful act, copies, in its principal features, the English Act of Lord Campbell. The effect of that statute is to create a new right of action, which vests in the personal representative and is not part of the decedent's estate. *Pym v. Great Northern Ry. Co.*, 4 B. & S. 396. The class of beneficiaries is, therefore, determined solely by the interpretation of the statute. In holding that a non-resident alien is included, the present case follows an earlier decision of a lower court. *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251. The English authorities upon this question are in conflict. See *Adams v. British, etc., Steamship Co.*, [1898] 2 Q. B. D. 430; *Davidson v. Hill*, [1901] 2 K. B. D. 606. Most American courts permit non-resident aliens to recover under similar statutes. *Mulhall v. Fallon*, 176 Mass. 266; *contra, Deni v. Pennsylvania R. Co.*, 181 Pa. 525. The language of these statutes seems to define the class of beneficiaries independently of residence or nationality. The contrary decisions rest upon a doctrine that statutes of a state are presumed, in the absence of express language, to apply only to persons within its territorial jurisdiction. See *McMillan v. Spider Lake, etc., Co.*, 115 Wis. 332, 337. While this rule of construction may be applicable to statutes imposing burdens, because of the inability of a state to fasten obligations upon aliens outside its territorial jurisdiction, no such reason exists for a similar interpretation of statutes conferring benefits.

DIVORCE — ALIMONY — PAYMENT AFTER DEATH OF HUSBAND. — The plaintiff was granted a divorce from her husband with alimony during her life, secured by a mortgage executed by her husband and the defendant. The plaintiff sued to recover alimony accruing since her husband's death. *Held*, that she cannot recover. *Wilson v. Hinman*, 182 N. Y. 408.

For an adverse criticism of the holding of the Appellate Division which is here reversed, see 18 HARV. L. REV. 541.

DOMICILE — MARRIAGE OF INFANT. — An infant whose parents were domiciled in Victoria was married in a foreign jurisdiction, where there was evidence tending to show his intent to settle. Upon divorce proceedings

instituted in Victoria it became important to determine his domicile. *Held*, that although the respondent has been married, still, as he is an infant, he is incapable of changing his domicile. *Robertson v. Robertson*, [1905] Vict. L. R. 546.

The court seems to lay down as an absolute rule that no infant can acquire a new domicile. It is hard to see why on principle this should be true in the case of an emancipated infant, who is entirely separated from his parents. It is clear that the settlement of an emancipated minor does not follow that of his father. *St. Michael's, Norwich v. St. Matthew's, Ipswich*, 2 Stra. 831; *Lowell v. Newport*, 66 Me. 78. On the contrary, such a minor may acquire a new settlement of his own. *Lubec v. Eastport*, 3 Me. 220. The statutes governing the acquisition of a settlement require a residence, which is usually construed as "domicile." *Abington v. North Bridgewater*, 40 Mass. 170. Therefore this would furnish authority for allowing an emancipated minor to acquire a new domicile of his own. It can hardly be said, however, that marriage alone works the emancipation of a minor. But in the ordinary case, where a minor after marrying establishes a home of his own, supporting himself, he does become emancipated. *Sherburne v. Hartland*, 37 Vt. 528; see also *Rex v. Wittoncum Twambrookes*, 3 T. R. 355. Though the point is disputed, it seems that the same would be true in the case of a minor married without his parents' consent. *Commonwealth v. Graham*, 157 Mass. 73. Thus the minor might by his marriage be enabled to acquire a new domicile. *Cf. Succession of Robert*, 2 Rob. (La.) 427.

EQUITY — INJUNCTION — RIPARIAN RIGHTS. — A corporation proposed to divert water from the Passaic River, at a point above the navigable portion, into New York to sell. The state of New Jersey, through the Attorney General, sought an injunction. *Held*, that the state, by virtue of owning the bed of the navigable portion of the Passaic River, is entitled, as a riparian proprietor, to an injunction to restrain the defendant from taking the water outside the state. *McCarter, Atty. Gen. v. Hudson Water, etc., Co.*, 61 Atl. Rep. 710 (N. J., Ch.).

The doctrine is a novel one, that the state has the rights of a "riparian proprietor" through ownership of the bed of the navigable portion of a stream. The words, "riparian rights," suggest that ownership of the bank is a necessary element. And this view is supported by the English rule that these rights do not depend on ownership of the soil under the stream. *Lyon v. Fishmongers Co.*, 1 App. Cas. 662. Riparian rights and restrictions, moreover, seem to have arisen from the benefit conferred by the stream upon the riparian tract. So a riparian owner may make a reasonable use of the water, such right of user being an incident to the soil, and passing therewith. *Union M. and M. Co. v. Ferris*, 2 Saw. (U. S. C. C.) 176. He is entitled to the natural flow, save for reasonable use by proprietors above. *Tyler v. Wilkinson*, 4 Mas. (U. S. C. C.) 397. But he may not assign his rights in gross. *Stockport Water Co. v. Potter*, 3 H. & C. 300. Nor may he use the water beyond the riparian tract. *Moulton v. Newburyport Water Co.*, 137 Mass. 163. In the case at hand apparently none of the usual riparian benefits are conferred upon the stream-bed; and so the reason for extending riparian rights to the owner thereof fails. The decision, however, may be supported on the ground of the state's right to object to improper interference with a navigable stream, even though such interference took place beyond the limits of the state, or above the navigable portion. *Cf. Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690; *Missouri v. Illinois and Chicago District*, 180 U. S. 208.

FALSE IMPRISONMENT — CIVIL LIABILITY — LIABILITY OF JUDICIAL OFFICER. — The defendant, a justice of the peace, issued a warrant returnable before himself, instead of before a justice in the town where the offense was committed, as required by statute. In spite of objection, he tried and convicted the plaintiff. This conviction was afterwards reversed. *Held*, that the warrant did not confer jurisdiction over the plaintiff, and that the defendant is liable in

a civil action for false imprisonment. *McCarg v. Burr*, 106 N. Y. App. Div. 275.

The defendant committed two errors: first, in causing an arrest under a defective warrant, and secondly, in convicting without jurisdiction. The issuing of a warrant, void on its face, is a wrongful exercise of a ministerial, as distinguished from a judicial, function, for which a justice is civilly liable. *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y.) 468. The sentence purported to be a judicial act, which is absolutely privileged. COOLEY, TORTS, 2d ed., 477. But the fact that a judge assumes jurisdiction does not of itself make his acts thereunder judicial. *The Case of the Marshalsea*, 10 Co. 369. The warrant being defective in substance, not merely in form, gave no jurisdiction in fact over the plaintiff. *Wills v. Whittier*, 45 Me. 544. The tendency, however, is to accord a presumption of jurisdiction, even to inferior courts. *Thompson v. Jackson*, 93 Ia. 376. In the principal case the assumption of jurisdiction did not arise from a mistaken fact, but from an error of law, on which two opinions could not honestly be entertained by reasonable men, and so the presumption of jurisdiction should not protect the defendant. Cf. *Grove v. Van Duyn*, 44 N. J. L. 654; see also 12 HARV. L. REV. 352; 13 *ibid.* 407. The criterion suggested for rebutting the presumption, analogous to that applied on motions to set aside verdicts, protects a judge from the consequences of every error of judgment, unless totally unreasonable, but leaves him answerable for the commission of a wrong that is practically wilful.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF HUSBAND AS TO THIRD PARTIES — LIABILITY OF HUSBAND FOR MAINTENANCE OF INSANE WIFE IN PUBLIC ASYLUM. — The trustees of a county insane asylum petitioned for an order to compel the defendant to pay a certain sum weekly for the support of his insane wife in the asylum, to which she had been committed by the proper public authorities. Held, that the defendant is not liable. *Richardson v. Stuesser*, 103 N. W. Rep. 261 (Wis.).

The common law liability of a husband for necessary expenses incurred by his wife after she has left his bed and board rests upon an implied contract, which is raised only where her departure is ascribable to his wrongful act or default. SCHOULER, HUSBAND AND WIFE, § 111. In the present case the husband is clearly guilty of no wrong, whether he sets in motion the machinery of the law, or merely yields, perhaps reluctantly, to the action of the public authorities in confining his wife. Thus there seems to be no ground for raising the implied contract, which alone, in the absence of a statute, should make the husband liable. Cf. *County of Delaware v. McDonald*, 46 Iowa, 170; *contra*, *Goodale v. Lawrence*, 88 N. Y. 513. There is a decided conflict of authority on the question involved; but the reasoning of the principal case seems sound, as public policy, which seeks at once the protection of the insane and of the community, demands that no selfish fear of liability on the husband's part shall block the effect of the wholesome legislation which requires the commitment of the insane to a public institution. See *Baldwin v. Douglas County*, 37 Neb. 283.

INSURANCE — COMMENCEMENT, DURATION, AND TERMINATION OF LIABILITY — INEVITABLE LOSS WITHIN PERIOD OF RISK. — A warehouse and goods therein were insured until April 1, 1902, noon. Held, that even though the destruction of the warehouse by fire appeared inevitable during the time limit of the policy, the company is not liable for loss to the goods if fire did not actually start in the warehouse until after April 1, 1902, noon. *Rochester German Ins. Co. v. Peaslee Gaulbert Co.*, 87 S. W. Rep. 1115 (Ky., Ct. App.).

A careful search of the authorities stamps this case as one of first impression. The court clearly points out that the liability of the insurer is for actual loss, and not for damage the imminence or certainty of which existed during the term fixed in the policy. The conclusion reached harmonizes with other branches of insurance law. See 17 GREEN BAG 674. So, where one insured against death in fact survives the term of the contract, no recovery can be had, even though he was attacked with a fatal disease before the expiration of the policy. See *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Lockyer v.*

Offler, 1 T. R. 252, 260. Similarly, to allow any recovery in marine insurance the vessel must have suffered loss during the term of the policy, and the extent of such recovery is restricted to the magnitude of the loss incurred during this term, though there be a subsequent total destruction. *Howell v. Protection Ins. Co.*, 7 Oh. (pt. 1) 284. Accordingly, if the "death wound" so received rendered subsequent total loss inevitable, indemnity for total loss should be allowed, for the property was thereupon rendered valueless. See *Coit v. Smith*, 3 Johns. Cas. (N. Y.) 16; *Duncan v. Great Western Co.*, 5 Abb. Pr. (N. Y.) N. S. 173. The court remarks *obiter* that a similar rule of damages would have been applied if the fire making total destruction inevitable had, in fact, attacked the warehouse during the life of the policy. But if the goods were insured as a separate risk, they are as much a separate subject of insurance as two adjoining buildings under separate policies. And the very basis of this decision is that fire must have attacked the insured property itself, and that vast depreciation caused by imminent danger from fire, which has merely seized contiguous property, gave no right to damages.

JUDGMENTS — RIGHT OF ASSIGNEE TO SUE FOR BREACH OF OFFICER'S DUTY. — *Held*, that the assignment of a judgment does not pass to the assignee the judgment creditor's right of action against an officer for misconduct which occurred prior to the assignment. *Commonwealth ex rel. Vicars v. Wampler*, 51 S. E. Rep. 737 (Va.).

On the question here involved, the authorities are squarely in conflict. *Cf. Redmond v. Staton*, 116 N. C. 140; *Citizens', etc., Bank v. Loomis*, 100 Ia. 266. It is generally admitted that the assignment of a judgment necessarily carries with it "all the beneficial interest of the assignor in the judgment, and all its incidents." See FREEMAN, JUDGMENTS, 4th ed., § 431. But "incidents," in its accepted meaning would not include a mere collateral right of action against a public officer, since such right of action is in no legal sense a security for the debt. See *Commonwealth for Faris v. Fugua*, 3 Litt. (Ky.) 41. Obviously justice requires that if the assignee of the judgment has suffered by its depreciation caused by an officer's breach of duty, he should be allowed to recover damages from the offending officer. Yet the legal claim against the officer, undoubtedly resting in the assignor prior to the assignment, can hardly have been transferred. The logical solution of the difficulty would seem to be that the assignor becomes constructive trustee of the claim for the benefit of the assignee. This being the situation, the assignee or beneficiary would in many jurisdictions be allowed to sue directly at law under the common statute providing that actions "shall be prosecuted in the name of the real party in interest."

LANDLORD AND TENANT — RENT — DISTRAINT OF CROWN PROPERTY. — A government horse used in the South African War was lent to a yeoman, and later was seized and sold under distress for the yeoman's rent. The government appealed from an adverse decision in an action for illegal distress. *Held*, that the appeal should be granted, since crown property on a subject's land cannot be distrained for rent. *Secretary of State for War v. Winne*, 22 T. L. R. 8 (Eng., K. B., Oct. 26, 1905).

Although no modern decisions on this point have been found, the doctrine of the case is supported by the ancient writers, and seems sound on principle. Where the crown was a tenant, the landlord was unable to distrain for rent. 9 *Vin. Abr.*, 2d ed., 125; *Brook Abr.*, pl. 46. Crown cattle damage feasant could not be distrained. *Rex v. Prior de Okeburne*, P. 22 E. I. If courts would not allow distress in that case, where the crown was at fault, they surely would not have allowed it in the case under discussion, where the crown was blameless. Sound principles demand the same result. The government must be absolutely unhampered in the use of its own property. For that reason, a state is not allowed to tax property belonging to the federal government. Similarly, neither federal nor state nor county property, retaining its public nature, can be levied on or sold under an execution. *Mayrhofer v. Board of Education*, 89 Cal. 110. For the same reason distress should not be allowed.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — STATEMENTS OF INTENDED WITNESS TO ATTORNEY AND CLIENT. — The defendant made defamatory statements to an attorney and his client in the course of their preliminary interview with him as a prospective witness. *Held*, that the defendant is protected by the same privilege which would shield him as a witness on the stand. *Watson v. M'Ewan*, [1905] A. C. 480.

It is now well settled that the defamatory words of a witness on the stand made with reference to the matter at issue are absolutely privileged. *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744. In the United States, however, the qualification is generally added that the statements must be pertinent to the enquiry. *McDavitt v. Boyer*, 169 Ill. 475. A few judicial expressions to the effect that this privilege is confined to the case of a witness while testifying on the stand were clearly made with no thought of the present situation. See *Seaman v. Netherclift*, 2 C. P. D. 53, 56. The answer to the question now raised, whether the absolute privilege of witnesses on the stand should be extended to preliminary examinations by attorneys, must depend on considerations of public policy. The judgment and reasoning of the court seem well grounded. Witnesses will not submit to a preliminary examination, through which the progress of trials is so much facilitated, if they are liable for statements then made. The public benefit obtained by the protection of the intended witness seems greatly to outweigh the little harm likely to result from a defamatory communication made only to an attorney and his client. For any republication, they may, of course, be liable. ODGERS ON LIBEL AND SLANDER, 4th ed., 165.

LIFE ESTATES — RESIDUARY BEQUEST OF CHATTELS PERSONAL FOR LIFE. — A testator bequeathed the residue of his chattels personal to his wife for life. *Held*, that the wife takes a life interest only. *Walker v. Hill*, 60 Atl. Rep. 1017 (N. H.).

The English and American authorities agree that a gift by will of personal chattels for life, with a limitation over, conveys to the first legatee an interest for his life only. *Vachel v. Vachel*, 1 Ch. Cas. 129; *Smith v. Bell*, 6 Pet. (U. S.) 68. The case in which a chattel personal is bequeathed for life, without a limitation over, has not arisen in England; but numerous American decisions hold that under this form of bequest also the interest continues during the legatee's life only. *Black v. Ray*, 1 Dev. & B. (N. C.) 334; *Anonymous*, 2 Hayw. (N. C.) 161. These principles apply equally where the bequest is of a residue as distinguished from a specific chattel. *Smith v. Bell*, *supra*. The technical nature of this life interest is a question on which the decisions are silent. The interest cannot be a legal *estate*, because the common law recognized no tenure and hence no estates in chattels personal. See 2 POLLOCK & MAITLAND, HIST. OF ENG. LAW, 2d ed., 182; *Welsch v. Belleville Savings Bank*, 94 Ill. 191, 204. The American decisions holding that a reversion exists when no limitation follows the bequest, negative the possibility of regarding the first interest as absolute and the limitation over as an executory bequest. Perhaps the most accurate form of statement is that the legatee has such an interest as entitles him to the use and possession of the chattel during his life. See 14 HARV. L. REV. 407-418.

PARTNERSHIP — PARTNERSHIP PROPERTY — CONVEYANCE TO FIRM IN FIRM NAME. — A firm continued to transact business under the name of "William Wray," a deceased partner. Land was purchased with firm money for partnership purposes, the deed of conveyance running to "William Wray" as grantee. *Held*, that the legal title to the land vests in the several members of the firm as joint tenants. *Wray v. Wray*, [1905] 2 Ch. 349.

No other English case has been found deciding the effect of a deed of land to a partnership in the firm name. In reaching the decision the court implicitly relied upon a former case, in which the same point was raised in connection with a chattel mortgage. *Maugham v. Sharpe*, 17 C. B. (N. S.) 442. The American decisions in point as to realty show a well defined conflict of authority. See 10 HARV. L. REV. 188. The predominant American rule vests title only in

those partners whose names appear in the firm name. *Holmes v. Jarrett Moon & Co.*, 7 Heisk. (Tenn.) 506; *Gille v. Hunt*, 35 Minn. 357. A number of decisions, however, tend to harmonize with the rule of the English case, which clearly commends itself to reason. *Hoffman v. Porter*, 2 Brock. (U. S. C. C.) 156; *Byam v. Bickford*, 140 Mass. 31. A deed of conveyance to be valid needs only to describe the grantee with reasonable certainty. *Morse & Houghton v. Carpenter*, 19 Vt. 613. Where a firm name collectively represents the individual members in usual business transactions, the name of that firm as party to a deed of conveyance would seem to describe the individual partners as grantees with sufficient certainty.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. — The plaintiff consented to allow the defendant to operate on her right ear. After anesthetics had been administered, the defendant discovered that the plaintiff's left ear was in a more serious condition than was her right. Consequently he operated upon the left ear. The plaintiff sued him for damages for an assault and battery. *Held*, that she may recover, since she had not consented to the operation on the left ear. *Mohr v. Williams*, 104 N. W. Rep. 12 (Minn.).

For a discussion of the principles involved, see 18 HARV. L. REV. 624.

RIGHT OF SUPPORT — REMOVAL OF SUPPORT — GRANITE QUARRIES. — A grantor made a conveyance of land in fee to the defendant, reserving title to the granite of which some was exposed; and afterwards conveyed his remaining interest in the lot to the plaintiff. *Held*, that though the plaintiff has title to all the underlying granite, he must leave a reasonable support for the surface and may quarry only the granite actually exposed to view from time to time. *Phillips v. Collinsville Granite Co.*, 51 S. E. Rep. 666 (Ga.).

Granite is included in the legal meaning of the word "minerals." *Armstrong v. Granite Co.*, 147 N. Y. 495. Unless the conveyance shows a contrary intention either in express terms or by strong implication, the owner of minerals underlying the surface must mine them so as to leave reasonable support for the surface. LINDLEY, MINES, §§ 818, 819. But a conveyance of minerals carries with it by implication the right of way over and through the surface necessary to mine them. *Turner v. Reynolds*, 23 Pa. St. 199. As granite can be obtained only by means of an open quarry, and therefore without leaving any surface support, there is here a conflict of principles. However, in the present case some granite was exposed when the reservation was made, and consequently could be quarried. As a reservation will be construed most strongly against the grantor, it would not be unreasonable to subordinate the right of quarrying to the right of surface support. *Harris v. Ryding*, 5 M. & W. 60. Moreover, a right of way of necessity is implied only when there is no other way. LEAKE, LAW OF USES AND PROFITS OF LAND 268. This right is to be exercised with due regard to the surface owner. *Chartiers Coal Co. v. Mellon*, 152 Pa. St. 286. The decision seems correct; but it is an interesting matter for speculation as to whether it should be followed where none of the stone is exposed.

SALES — RIGHTS AND REMEDIES OF BUYERS — EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DEFECTIVE PERFORMANCE. — The Kentucky Court of Appeals has recently stood evenly divided on the question, whether, in an action by a seller for the price of machinery, acceptance by the buyer waives his right to damages for failure to deliver at the time required by the contract. *Lucile Min. Co. v. Fairbanks, Morse & Co.*, 87 S. W. Rep. 1121. See NOTES, p. 208.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX: EQUITABLE CONVERSION OF FOREIGN REAL ESTATE. — A testator gave his executor power to sell his real estate situated in another state. At the time of his death his personal estate was insufficient to pay his debts and pecuniary legacies. *Held*, that the foreign real estate is equitably converted, and thereby

becomes liable as personalty to a collateral inheritance tax of the state where the testator was domiciled. *In re Vanuxem's Estate*, 61 Atl. Rep. 876 (Pa.). See NOTES, p. 201.

TAXATION — WHERE PROPERTY MAY BE TAXED — PERSONALTY AT DOMICILE OF OWNER. — Under a statute authorizing the taxation of "all personal estate of corporations organized under the laws of Kentucky whether the property be in or out of this State," a domestic corporation was taxed on cars which were used exclusively outside the state. *Held*, that the tax is unconstitutional, since it is depriving a person of property without due process of law. *Union, etc., Company v. Kentucky*, U. S. Sup. Ct., Nov. 13, 1905. See NOTES, p. 206.

TAX SALES — REDEMPTION — RIGHTS OF ORIGINAL OWNER AGAINST SUB-VENDEE. — A deed was given and recorded for land bought at a tax sale. Within the required period, the original owner redeemed, and received the tax deed from the purchaser, but did not get a quit-claim deed. After the period for redemption, the purchaser at the tax sale sold the property to the plaintiff who now claims title as a *bona fide* purchaser, since he had no actual notice of redemption. *Held*, that the plaintiff has no title, because sufficient notice of redemption is presumed from the fact that the purchaser at a tax sale has, by the law of the state, only an imperfect title until the period for redemption has expired. *Bennet v. Southern Pine Co.*, 51 S. E. Rep. 654 (Ga.).

The decision can be rested on more fundamental grounds than constructive notice. The first purchaser's title was defeasible on redemption, and redemption had been made. At that moment *ipso facto* the title re-vested in the original owner. *Burns v. Ledbetter*, 54 Tex. 374. Redemption itself, and not record of redemption, defeats the purchaser's title. *Cooper v. Shepardson*, 51 Cal. 298; *Fenton v. Way*, 40 Iowa 196. Even in states that require record of redemption, if an owner can prove redemption in fact, a tax deed issued later will give no title, though the purchaser did not know of the redemption on account of a clerk's failure to record it. *Burke v. Cutler*, 78 Iowa 299. In Georgia there is no provision requiring redemptions to be recorded. See Civ. Code, 1895, § 3618. Nor does the statute directing the purchaser to execute a quit-claim deed on redemption alter the case. Such statutes are to be construed liberally in favor of the parties entitled to redeem. *Burton v. Hintrager*, 18 Iowa 348. The Georgia statute provides that the quit-claim deed from the purchaser at the tax sale shall be *prima facie* evidence of redemption, not that redemption cannot be proved in other ways. If redemption is in fact proved, as here, then the purchaser, or anyone claiming under him, has lost his title absolutely, and that of the original owner must prevail.

TRUSTS — CREATION AND VALIDITY — TENTATIVE TRUSTS IN SAVINGS BANK DEPOSITS. — A spendthrift deposited his money in savings banks in the names of his sisters as trustees for his children, and delivered to the trustees the bank-books, intending thereby to save his money from being squandered, and to have it kept for the support of himself and his family during his life, and go to his children at his death. *Held*, that such deposits create "tentative" and not irrevocable trusts during the depositor's lifetime. *Lattan v. Van Ness*, 95 N. Y. Supp. 97. See NOTES, p. 207.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY OF TRUSTEE FOR ACTS OF CO-TRUSTEE. — A trustee, with the consent of the *cestui* and the other trustee, sold a part of the *res*. Instead of reinvesting the proceeds, as was intended, he kept them; showing his co-trustee a forged receipt of the new stock which he purported to have bought. The *cestui* now brings action against the innocent trustee. *Held*, that this trustee was not negligent in dealing with his co-trustee and that he is, therefore, not liable for the defaults of that co-trustee. *Shepherd v. Harris*, L. R. [1905] 2 Ch. 310.

If, as in this case, there is no question of connivance or negligence, and if there is no special assumption of liability, then by a well settled rule of law, a trustee is not liable for the defaults of a co-trustee. *Townley v. Sherborne*,

3 White & Tudor Lead. Cas. Eq. 430. Nor is the trustee's liability increased by his dealing with his co-trustee as an agent. A trustee has power to appoint an agent to do certain ministerial acts, as, for example, to purchase specified stock; and one of the trustees may be appointed such an agent. *Purdy v. Lynch*, 145 N. Y. 462; see PERRY, TRUSTS § 404. In appointing and dealing with agents, a trustee need exercise only the same amount of care as a reasonable man of business would exercise in regard to similar affairs of his own. *Speight v. Gaunt*, 9 App. Cas. 1. The trustee here did exercise such reasonable care in dealing with his co-trustee as agent, and so is clearly not liable.

WITNESSES — PRIVILEGED COMMUNICATIONS — REPORT OF RAILWAY ACCIDENT. — The defendant company required from its servants a report of the particulars of every accident, partly with a view to possible litigation. *Held*, that documents containing such reports are not privileged. *Savage v. Canadian Pacific Ry. Co.*, 41 Can. L. J. 670 (Manitoba, K. B., June 15, 1905).

The doctrine of privileged communication between attorney and client is one of expediency, since the former must have as full information as possible in order to protect the interests of the latter. But this doctrine appears to have been extended very far in some cases of communications from or to third persons, which, clearly, should not be privileged unless such privilege is necessary for the protection of the relation between attorney and client. *Glyn v. Caulfeild*, 3 Mac. & G. 463. The mere fact that a party has, in view of litigation, obtained a report from a distant agent should not operate to give such party a privilege which one who has made a personal investigation under similar circumstances would not have. *Anderson v. Bank of British Columbia*, 2 Ch. D. 644. Such a report should on principle be privileged only when requested by the party's attorney, or for direct submission to him, with litigation definitely in view. *English v. Tottie*, 1 Q. B. D. 141. The privilege rightly discountenanced in the principal case would exempt practically all reports and accounts, being kept partly with a view to future possible litigation. It seems that as a rule no document made in the ordinary routine of business should be privileged. *Woolley v. North London Railway Co.*, L. R. 4 C. P. 602.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE PERSONALITY OF THE CORPORATION. — To decide cases on the authority of decisions that have gone before and the good, sound sense of the situation, without an over-nice inquiry into the fundamental theories of particular legal concepts is, perhaps, characteristic of Anglo-Saxon practical mindedness. Decisions are piled on decisions, phrases embodying slothful reasoning become threadbare by repetition, before the field is canvassed for a rational basis of the authorities or for a recognition of diverse conceptions expressed in conflicting authorities. That a definitely conceived theory may involve conclusions radically different from those obtained by a blind groping for results is probably nowhere more vitally true than in the law of corporations. The multiplication of questions presented and the extent to which corporations enter into the present social organization compel, for an intelligent dealing with the problems involved, too long neglected inquiries into the corporate idea.

Several theories of corporateness have been propounded, which will be found set forth in the highly suggestive Yorke Prize Essay of Mr. C. T. Carr, just issued by the Cambridge University Press. The investigation into the nature of the corporation is also pursued with great clearness and much vigor in the

last number of the Law Quarterly Review. *The Personality of the Corporation and the State*, by W. Jethro Brown, 21 L. Quar. Rev. 365 (Oct., 1905). After dwelling on the unsatisfactory state of legal learning on the subject, Mr. Brown recalls familiar principles of corporation law. A corporation is not identical with the individuals who compose it, nor is it the equivalent of the sum of its members. It is, therefore, a distinct subject of legal rights and duties; it is in law a person. "Wherever the law attributes rights or duties to an entity or institution, it makes a person of, or recognizes a person in, that entity or institution." Is the personification of the corporate entity an artificial, convenient fiction or is it suggested by, and does it result from, real analogies to natural personality? The fiction theory encounters this dilemma: either there are legal rights without a holder, or the rights are those of the incorporators. The first position is untenable. The alternative view finds its refutation in a consideration of human associations in general and corporations in particular. That a group is inherently different from the sum of the individuals composing it is a psychical fact. Historical considerations no less than a comparison with other so-called fictitious legal personifications, as *e. g.* the *hæreditas jacens* (see HOLMES, COMMON LAW 342 *et seq.*), refute the contention that the corporation is a mere metaphor, a fiction. Bodies possessing all the essential attributes of corporateness existed before the alleged creation of corporations by charter or statute.¹ Corporations instead of being the creatures of the law compelled recognition from the law. In truth "the fiction theory is but a stage in the evolution of legal ideas." The phenomenon of corporate personality does not fit into known legal categories, but since it satisfies the test of personality in having capacity for legal rights and duties, it is most natural to treat it as though it were a person, with a slowly growing recognition that the analogy is more real than fictitious. But in attributing reality to this person, a real person must not be confused with an actual person. "When we say that this corporate person is not a legal fiction, we imply no more than that it is a representation of psychical realities which the law recognizes rather than creates." Among the numerous differences between corporations and physical persons special attention may be called to those relating to their origin and the faculties of willing and acting. Corporations are more the result of "conscious foresight" than physical persons; there is more of creation than of growth. The corporation wills by a majority, and acts, unlike an individual, through the mediation of another person best characterized, perhaps, as an organ. It is, then, neither an actual nor a fictitious person; it is a "psychical reality—a reality arising from unity of spirit, purpose, interests and organization." And after discarding various adjectives, "artificial," "juristic," "moral," "ideal," the author fastens on the name *collective person*. The relation of the corporation to other persons, legal and non-legal, is then treated and schematized.

That the author's purpose did not permit him an inquiry into various forms of unincorporated associations, especially trade-unions, in the light of the Taff Vale decision, is regrettable. The final discussion as to the theory of the state is, perhaps, of less immediate interest to the American reader. Mr. Brown thinks it is only a matter of time before the state as a collective real person will be recognized, with important differences as to control, growth, and development between the state and other collective persons.

While the object of this notice has been to call emphatic attention to this article, leaving to others a searching analysis, yet one or two comments suggest themselves. An adoption of this realistic theory seems to be tacitly made in the American doctrine of *de facto* corporations. Its frank avowal would give an intelligent basis for decisions that are too often supported by that most overworked of all legal arguments, estoppel. Further, its recognition would have an important bearing on the law of *ultra vires*. By asserting a personality apart from legal creation, a general capacity to contract must be conceded,

¹ To maintain that corporations are fictitious is, therefore, as Mr. Carr points out, adherence to the fiction theory purchased at the cost of another fiction. See Carr, *Law of Corporations* 174.

leaving the courts to deal with the abuse of corporate power as they do with that of the individual's contractual rights, on grounds of public policy and not corporate incapacity. See *The Unauthorized or Prohibited Exercise of Corporate Power*, by George Wharton Pepper, 9 HARV. L. REV. 255. Similar grounds of policy would explain the refusal of American courts to enforce corporate liability where an association actually formed has not substantially complied with the requirements of the law.

THE JURY SYSTEM IN THE UNITED STATES AND ITS EXTENSION TO THE PHILIPPINES. — Probably no recent address on a legal subject has provoked such widespread discussion as that delivered last June at the Commencement exercises of the Yale Law School. *The Administration of Criminal Law*, by William H. Taft, 15 YALE L. J. 1 (Nov., 1905). Secretary Taft points out that while the civil law has been content to leave much to the consciences of rulers, the common law protects the individual by insisting not so much on general principles as on forms of procedure. The most important of these is the right of trial by jury. Yet, though our Constitution requires issues of fact in civil cases at law involving more than twenty dollars to be tried before a jury, much the same issues in cases in equity are tried without one. Since the abolition by many of our codes of procedure of the distinction between law and equity in civil actions, a lawyer is needed to tell whether a suit brought is at law or in equity. Further, in more than half the civil suits a jury is dispensed with by consent of the parties. Certainly, under these conditions, the constitutional requirement of a jury trial cannot be said to rest on any fundamental principles; nor would the abolition of the requirement, with proper appeal, deprive a litigant of an impartial hearing. Consequently, as Secretary Taft questions the value of the system even in the United States, he is opposed to introducing it into the Philippines in civil suits. To introduce it in criminal cases would, similarly, be unwise. Criminal procedure in this country presents a lamentable contrast to that in England, where by the judges' retention of control over the jury, the lack of appeal, and the better quality of men available for jury service, a reputation for certainty of punishment is maintained. Here much legislation prevents the judge from being more than a moderator at a religious meeting. He is prohibited from commenting on the facts, which is essential if instructions are to be of value, and no opportunity is given him to dispel the sentimental atmosphere too often created by the attorney for the accused. The number of peremptory challenges allowed the defendant operates against securing as jurors men of force or of character. The ease of appeal on the slightest technicality, which stands between the defendant and his just conviction, is another cause of the laxness of administration of our criminal laws. When these are the conditions surrounding trial by jury in the United States, to extend it to the Philippines, where conditions are less favorable, would be impolitic. The Filipinos are still an ignorant people, and the juror in deciding between the state and the accused would be moved by every motive other than that of the well-being of the state. Moreover, the civil law, in force in the islands, lacks a code of evidence, almost an essential of the jury system.

While Secretary Taft's long experience and soundness of judgment entitle his opinion to great weight, his criticisms of the jury system have brought forth many protests, based on widely divergent grounds. One writer insists that the judge's functions are properly limited to those of moderator, and that therefore our restrictions have been wise. *Observations on Secretary Taft's Text*, by John J. Crandall, 28 N. J. L. J. 267. The prevailing opinion seems to be that while the shortcomings of our criminal procedure are undoubted, and to introduce the jury into the Philippines would be unwise, the Secretary of War has been too warm in his denunciation of the American jury trial. The limitations upon the power of the judge; the technicalities taken advantage of on appeal; the number of peremptory challenges and the many exemptions allowed,

which result in excusing from jury duty many of those best qualified to act in the increasing complexities of litigation, when a higher standard of intelligence among the jurors is needed — all these, though defects, are regarded not as defects in the system, but in its administration, and, as such, reasons not for discarding the jury system, but for cleansing it of these growths upon it. One judge, or a number of judges, would not, it is suggested, be more satisfactory in deciding issues of fact than the jury of twelve; and to the unique power given our judiciary to declare legislative acts unconstitutional, the jury power, born of the sovereignty of the people, should not be added. *The Jury System*, by William H. Holt, 67 Alb. L. J. 298. Cf. *The Administration of the Jury System*, by Henry B. Brown, 17 Green Bag 623.

GOVERNMENTAL REGULATION OF PRICES. — A writer in the Green Bag touches upon a subject often discussed but always of interest and importance. *Governmental Regulation of Prices*, by Eugene A. Gilmore, 17 Green Bag 627 (Nov., 1905). The mediæval method of bringing into effect just prices, wages, and hours, says Mr. Gilmore, was by fixing them through the consultation of experts, whose estimates were enforced by positive law. In England the cost of the necessities of life was made subject to regulation as early as the fourteenth century, in the days of the Black Death. Subsequently such matters as the binding of books and the sale of beer barrels and of long bows came under supervision. In the New World the power of government to legislate upon prices and wages was recognized by comprehensive statutes passed in Massachusetts (1777) and in New York (1778). Neither in England nor in America, however, were laws of this character successfully enforced.

Modern public opinion, viewing general interference with private business as a deprivation of liberty and property prohibited by the Constitution, relies upon the regulating force of free competition. Yet the efficacy of the police power remains unimpaired by the Fourteenth Amendment, and under it the case of *Munn v. Illinois* (94 U. S. 113) and decisions following enunciated the right of the state to regulate prices and rates in all businesses "affected with a public interest." Interpreting this as sanctioning interference whenever "essential or desirable for the public good," Mr. Gilmore concludes, "if dominant public opinion should favor a return to the paternalistic conditions of mediæval England, or to some modified and less extensive control of private business, such as reasonable restrictions on the hours of labor, and prohibitions on the manipulation of prices, . . . the Constitution should not be construed to check the working out of such opinion." Mr. Gilmore's rule of loose constitutional construction is that toward which the dissenting minority in the Warehouse Cases believed the Supreme Court to be tending. See *Munn v. Illinois*, 94 U. S. 113, 136; *Budd v. New York*, 143 U. S. 517, 548; *Brass v. North Dakota*, 153 U. S. 391, 405. It has, however, not yet met with the approval of constitutional lawyers, who seem to require a rather intimate connection between the business which it is sought to subject to legislative interference and some one of the very general objects sought by the police power, namely, public safety, health, morals, or welfare. See COOLEY, CONST. LIMS. 870 *et seq.* The authorities probably warrant no more definite statement than that rates are subject to regulation in those businesses possessed of the elements of a legal or a virtual monopoly. See *The Law of the Public Callings as a Solution of the Trust Problem*, by Bruce Wyman, 17 HARV. L. REV. 156, 217. Certainly the courts show little tendency to set aside, under the excuse of an unlimited police power, all constitutional safeguards against interference with private enterprise, and it is probable that any new business will be made subject to regulation only so far as such regulation becomes essential by reason of peculiar circumstances attending it. See FREUND, POL. POWER, § 378; *Public Service Company Rates and the Fourteenth Amendment*, by N. Matthews, Jr., and W. G. Thompson, 15 HARV. L. REV. 249; *Opinions of the Justices to the House of Representatives*, 55 Mass. 598; 182 *ibid.* 605.

- ADMINISTRATION OF CRIMINAL LAW, THE. *William H. Taft*. 15 Yale L. J. 1. See *supra*.
- BANK STOCKHOLDERS AS NOTARIES. *Anon.* A digest of cases and statutes illustrating the conflicting positions of a score of jurisdictions, on the competency of such notaries. 22 Bank. L. J. 759.
- BLENDING LEGAL SYSTEMS IN THE PHILIPPINES. *Charles S. Lobingier*. 21 L. Quar. Rev. 401.
- CERTIFICATION OF SHARES. *Frank Evans*. 21 L. Quar. Rev. 340.
- CONFUSION OF PATENT COURTS IN THE UNITED STATES, THE. *Fritz v. Briesen*, 5 (The) Brief, 358. See 18 HARV. L. REV. 217.
- CONGRESS OF ADVOCATES AT LIÈGE, 1905, THE. *Edward Cox-Sinclair*. Stating questions discussed before International Federation of Bars of Continental States, *e. g.*, whether an advocate should be allowed to practice other callings. 31 L. Mag. & Rev. 74.
- CONSIDERATION *v.* CAUSA IN ROMAN-AMERICAN LAW. *Joseph H. Drake*. A study of the Louisiana law of consideration for contracts as bearing upon the interpretation of the Porto Rican code. 4 Mich. L. Rev. 19.
- COVENANTS IN RESTRAINT OF TRADE. *Anon.* A full collection of the English authorities. 119 Law T. 527.
- DEVELOPMENT OF ROMAN MARRIAGE. *A. H. J. Greenidge*. 21 L. Quar. Rev. 357.
- GOVERNMENTAL REGULATION OF PRICES. *Eugene A. Gilmore*. 17 Green Bag 627. See *supra*.
- GROWTH OF THE POWER OF CONTRACT IN THE HISTORY OF THE LIABILITY OF COMMON CARRIERS. *Hugh E. Willis*. 5 (The) Brief, 231.
- INTERNATIONAL AGREEMENTS WITHOUT THE ADVICE AND CONSENT OF THE SENATE. I. *James T. Barrett*. An historical and argumentative discussion of the power of the states to enter, with the consent of Congress, into agreements or compacts with each other or with a foreign power. 15 Yale L. J. 18.
- JURY SYSTEM, THE. *Wm. H. Holt*. 67 Alb. L. J. 298. See *supra*.
- LORD TENTERDEN'S ACT IN THE UNITED STATES, AND AN IMPORTANT OMISSION THEREFROM. *Wilmer T. Fox*. Discussing the effect of omitting in the Massachusetts revised statute, and in the statutes of several states copied from it, the clause, "to the intent that such person may obtain credit, money or goods." 61 Cent. L. J. 344.
- NEUTRAL TRADE IN CONTRABAND OF WAR. *Douglas Owen*. Suggesting remedial measures to obviate the commercial disadvantages arising under the present state of International Law on this subject. 31 L. Mag. & Rev. 51.
- OBSERVATIONS ON SECRETARY TAFT'S TEXT OF JUNE 18, 1905. *John J. Crandall*. 28 N. J. L. J. 267. See *supra*.
- PERSONALITY OF THE CORPORATION AND THE STATE, THE. *W. Jethro Brown*. 21 L. Quar. Rev. 365. See *supra*.
- PROVINCE OF THE JUDGE AND OF THE JURY, THE. I. *G. Glover Alexander*. An historical dissertation on the struggle in England between government and people, resulting in the rule that questions of fact are for the jury, those of law for the judge. 31 L. Mag. & Rev. 1.
- REFORM OF THE PATENT LAW. *J. W. Gordon*. A scholarly discussion of the reforms needed in the English Patent Law. 31 L. Mag. & Rev. 31.
- SHORT STUDIES IN THE COMMON LAW. II. TORTS. *A. Inglis Clark*. A general discussion of the nature of liability in tort. 2 Commonwealth L. Rev. 250.
- SOURCES OF ANCIENT SIAMESE LAW, THE. *Tokichi Masao*. Setting forth texts from ancient laws of Siam and the Hindu Code of Manu to prove that ancient laws of Siam are of Hindu origin. 15 Yale L. J. 28.
- SOUTH AFRICAN RAILWAY CASE AND INTERNATIONAL LAW, THE—A REPLY. *J. Westlake*. An answer to an earlier article which criticised the position taken by the British Government. 21 L. Quar. Rev. 335.
- STIPULATIONS IN FIRE INSURANCE CONTRACTS AFFECTING THE INSURED'S RIGHT OF RECOVERY. *Roy Elias Ressler*. Collecting the authorities. 61 Cent. L. J. 323.
- TURKISH CAPITULATIONS AND THE STATUS OF BRITISH AND OTHER FOREIGN SUBJECTS RESIDING IN TURKEY. *Edwin Pears*. Arguing that by reason of the fictitious extritoriality of British subjects in Turkey, their children for indefinite generations remain bound in allegiance to England. 21 L. Quar. Rev. 408.
- UNIFORM STATE LAWS GOVERNING NEGOTIABLE DOCUMENTS OF TITLE. *Francis B. James*. 4 Mich. L. Rev. 41.

II. BOOK REVIEWS.

CASES ON QUASI-CONTRACTS, Edited with notes and references. By James Brown Scott. New York: Baker, Voorhis, and Company. 1905. pp. xvi, 772. 8vo.

Professor Scott's object in making this book was to provide a case book of moderate size for the use of students. The bulk of Judge Keener's case book, including, as it frequently does, many cases reprinted in full, illustrative of the same application of a legal principle, makes it an unsatisfactory book for the use of students in a half course. Professor Woodruff's book, by an odd coincidence, appeared almost simultaneously with the work under review.

By condensation of some cases and by the selection of short cases, wherever this was possible, Professor Scott has adequately covered at least as much ground as Judge Keener did. As the publishers of the new book were the owners of the copyright of the older work and placed it at the disposal of Professor Scott, he might fairly have made much larger use of it than he has done. Though many cases in the two books are identical, the large majority are not, and the new cases are well selected. The notes greatly add to the value of the work, and the editor has used his learning in the Civil Law to furnish the book with illustrations from that source. In this way he has shown not only the antiquity, but the inherent propriety of treating quasi-contracts as a separate department of the law. The syllabus index is an excellent piece of work, the more meritorious because many case books are without such aid to the reader.

The book gives rise to a suggestion, not a criticism, which concerns the making of case books generally and which involves a question upon which opinions will doubtless differ. In the division of the law into various topics, it is impossible that each topic should wholly exclude every other. Consequently not only do treatises on one subject in fact deal with many matters which are also dealt with by treatises on other subjects, but completeness of treatment can be obtained in no other way. We wish to raise the question whether it is desirable to make case books upon the same plan. Case books are used only for the instruction of students. They do not and never can take the place in professional use which treatises occupy. The utility of the plan of a case book for instruction in a law school must be the governing consideration. Is it desirable, then, to include such matters as general average and contribution between sureties in a case book on quasi-contracts? Both topics present instances of quasi-contractual obligations, but are not the places for the student to consider them courses on admiralty and suretyship? Professor Scott disclaims any treatment of these topics beyond what is essential to show the quasi-contractual nature of the obligation; but is it possible to take up satisfactorily with students a number of cases on contribution between sureties, without going into the matter at large, in the same way as would be done in a course on suretyship? It may be urged that this may well be done both in a course on suretyship and in one on quasi-contracts, and that the student will gain from approaching the matter on several sides. Doubtless there are some questions of legal theory so fundamental that they must arise in more than one course, but, where possible, does not the great pressure for time in our legal courses require that duplication of work should be avoided? If so, the author of a case book should not endeavor to touch upon every matter logically within its title, but should deal with such matters only as belong to that title exclusively or more naturally than to any other. Such matters as are included should be dealt with thoroughly, for students cannot satisfactorily study from cases a single aspect of a subject or of a decision.

A related question may be raised in regard to arrangement. Professor Scott follows Judge Keener in making such introductory headings as "Wherein quasi-contract differs from a pure contract," and "Wherein quasi-contract differs from a tort." These are appropriate headings for a treatise, and under them an author would properly consider one aspect of decisions most of

which would be cited elsewhere in the book for the point primarily decided by them. But teacher and student dealing with cases must generally deal with them once for all. The minute subdivision of a treatise cannot, therefore, be satisfactorily used as a model. The cases must be grouped according to their most general and obvious effect, and subordinate matters must be brought out in passing. The time when the student of Professor Scott's book might fairly be asked wherein a quasi-contract differs from a pure contract or a tort, is at the close of the book, for most of the cases in it in some degree aid in the answer, rather than after reading the sections specifically devoted to these questions.

We have taken the occasion afforded by the appearance of Professor Scott's book to suggest an inquiry we have had for some time in mind. In so doing we fully recognize, and wish to make it clear, that more than one answer to the inquiry will find champions and that even where the views here suggested are accepted, the application of them will give rise to new difference of opinion. Each instructor must to some extent follow his own idiosyncrasies, whatever book he may use. Professor Scott has furnished abundant and well selected material, carefully edited and annotated. This is the one essential requisite, and it is fully satisfied.

S. W.

THE LAW OF BAILMENTS, INCLUDING PLEDGE, INNKEEPERS AND CARRIERS. By James Schouler. Boston: Little, Brown, and Company. 1905. pp. xxxii, 415. 8vo.

This book, which is based upon a larger work by Professor Schouler, might better have been named Carriers, including Bailments, for more than two thirds of the work is devoted to a discussion of the peculiar law governing carriers, not only as bailees of goods but as transporters of passengers. The one third concerned with the treatment of the general law of Bailments serves as an introduction enabling the author to give up the balance of the book to a consideration of those features of the law of Carriers which are *sui generis*.

The principles of the law of Carriers are fairly well settled, and are comparatively simple. The recent decisions seldom give more than the application of the old saws to the modern instances. Beyond question the author has, generally speaking, stated both the principle and the precept; the defects of the book are in the manner of presentation.

Taking the volume as a whole, its dominant characteristic is carelessness. Carelessness marks the index, the heading of paragraphs, the rhetoric, and even the distinctions taken. We are told in the preface that "the main purpose of this volume is to supply students and the professional lawyer alike with an elementary treatise which may serve for study and practical use." Yet its contents are so inadequately and so unscientifically indexed as to reduce the practical value of the book to the professional lawyer to a minimum. For example, one can find "stoppage *in transitu*" only by turning to the head "CARRIERS, COMMON (or PUBLIC)"; then to the subhead, "termination of carrier's responsibility" (p. 409); and then to the sixth line under this subhead, which reads, "doubt; 'care of'; misdirection; stoppage *in transitu*, 397, 398." And this is but one of many cases of needles in the haystack.

The first few words of the opening sentence of each paragraph are printed in bold-faced type, an expedient which, in many instances, fails altogether to indicate the substance of the paragraph. Thus a paragraph which informs us that canal companies, tug-boats, and log-drivers are not common carriers because they do not control the transporting vehicle is headed, "But here, as elsewhere, the employment to be designated" (p. 152). See also paragraph 261, p. 139.

It is in his rhetoric, however, that the author is most remiss. Only a few sentences need be quoted to demonstrate the book's weakness in this respect. At page 128, in discussing the tests for determining the status of guest, the author says, "Commonly the guest is a temporary sojourner who puts up at the inn to receive its customary lodging and entertainment; and so long as one keeps this transient character." And at page 133, § 309, "and for all acts of his servants . . . directly occasioning loss or injury, the innkeeper must still re-

spond. . . . But other risks may probably be guarded against, or a special valuation set, if reasonable, upon a closed receptacle." And at p. 151, "Nor is a stockyard company or other mere agistor or warehouseman for a carrier." These are merely conspicuous examples of the loose, careless construction which appears upon every page.

It is, moreover, questionable whether the distinctions taken by the author were all well considered. At page 121, "the three distinguishing characteristics of a public bailment vocation" are pointed out to be, first, that a bailee in that vocation must serve all alike; second, that he is an insurer; and third, that, "by way of offset or limitation to these conditions, the bailee may always claim his reasonable recompense in advance." Is it not true, however, that payment in advance can be exacted by *all* bailees, and that *all* can, if they desire, serve on credit? Apropos of this it may be mentioned that the author does not specifically advert to what is often spoken of as one of the peculiar elements of the "public bailment vocation," namely, the duty of one in that vocation, within the limits of his public profession, to provide adequate facilities. This duty, however, is in a general way in special instances recognized in the book. See paragraphs 255, 256. In paragraph 232 it is stated that, "A boarding-house or lodging-house keeper, pursuing that means of livelihood, is again to be distinguished from a private householder who only casually or upon special consideration receives a boarder or lodger into the family." But paragraph 252 is to the effect that, "The innkeeper is an ordinary bailee where the vocation is not exercised towards the particular person and his personal property upon the strict innkeeping relation. And thus is it, also, in the usual business of boarding-houses and lodging-houses, by the better opinion, or with mere boarders and lodgers generally." See paragraph 239 for another unilluminating distinction.

It is cause for sincere regret that a writer, who undoubtedly knows his subject well, should have been so lax in his presentation of it. C. M. O.

THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND IN EQUITY. Second edition. By John D. Lawson. St. Louis: The F. H. Thomas Law Book Company. 1905. pp. xxvi, 688. 8vo.

As the number of decisions multiplies most rapidly each year, and as the law is continually changing and expanding, a new text-book carrying the cases down to date is always welcome. In the law of Contracts it is doubly welcome because of the dearth of recent authoritative works. The old standard, Parsons on Contracts, has gone through so many editions that its unending sequence of editors' notes makes it now almost unusable. Aside from it, there is Professor Harriman's short work, of comparatively recent publication, and Page on Contracts, of the present year. The latter is a large treatise better adapted for exhaustive reference than to serve as a handbook. Professor Lawson's work, of which the first edition appeared in 1893, is a book adapted to the hasty examination of the busy lawyer. In this respect it resembles Professor Harriman's work, although its treatment is somewhat fuller.

As a whole the work is more easily praised than criticised; but attention may be directed to certain defects of statement and treatment. In § 29, under Formation of the Contract, in attempting to explain the rule by which a contract is held to be completed upon the mailing of the acceptance, the author adopts the erroneous suggestion often found in decisions, the fiction of the mail being the agent of the offerer. As a matter of fact, there is no ground of agency at all: the post-office is a governmental function, not the agent of anybody; and if it could be an agent, it would be the agent, not of the offerer, who does not hire it to bring the acceptance, but of the offeree, who pays the postage on the letter. So in § 253 the statement that a waiver does not require a consideration to be binding, seems too strong, as in general a waiver to be binding requires either a consideration or an estoppel. Again, the treatment of the subject of promises for the special benefit of a third person is open to criticism because of the

failure to distinguish between promises for the sole benefit of a third person and those cases where the primary object is to discharge an obligation of the promisee. See 15 HARV. L. REV. 767. So § 460, dealing with anticipatory breach, is objectionable in that it only gives one half the story, namely, the side in favor of the doctrine, when as a matter of fact there is strong support for the opposing view. See the collection of cases 14 HARV. L. REV. 433, note 5. Apart from these defects of substance, a fault of form which detracts from the general excellence of the book, is the number of typographical errors scattered throughout it. A few mistakes of this kind may be overlooked, but a work which displays more than its share suggests an almost unpardonable negligence in proofreading.

On the other hand, to point out some of the salient points of excellence, the author's treatment of the Statute of Frauds is admirably concise and accurate. In §§ 128-160 his dealing with the law of persons in its relation to contracts is clear and thorough. So his discussion of the law as applied to wagering contracts and contracts of insurance is good. The arrangement of the book, which is closely allied to that adopted by Page, makes a commendably logical presentation of the subject, treating first of the various essentials to the formation of a contract, and then of the legal and equitable remedies available when the contract relation has been established.

G. H. F., JR.

A MANUAL RELATING TO THE FORMATION AND MANAGEMENT OF MERCANTILE AND MANUFACTURING CORPORATIONS, with Forms. A Book of Massachusetts Law. By George F. Tucker. Second Edition, Revised, including Revised Laws, Statutes of 1903-1905, and Massachusetts Reports, Vol. 187. Boston: Little, Brown, and Company. 1905. pp. xxvii, 401. 8vo.

This book, as its title implies, is not a treatise, but a book for practical, everyday use by the practicing lawyer, the business man, the investor, or the corporation official who desires to know what the law is and how to act in a given situation. It is gratifying to be able to say that there is an adequate index, a convenience which is none too frequently provided, though indispensable in a book intended for constant use. The changes that have come about in corporation law since the appearance of the first edition, in 1887, make apparent the need for this new edition. Like others of Mr. Tucker's works, the present volume is a book of Massachusetts law; and while not so elaborate as Mr. Dill's work on the New Jersey corporation law, it is a book that will be distinctly serviceable to Massachusetts lawyers. The author has very wisely included forms, and wisely, too, has not set them apart in an appendix, but has worked them into their appropriate places in the text. To make the forms readily available, a separate index of them has been made.

The type, paper, and binding are excellent, but it would have been better to have subdivided the text more often, or to have indicated divisions by headings or spacing. There being no variation of type, and no spacing, it is difficult for the eye to find at once the particular reference obtained by use of the index.

S. H. E. F.

THE AMERICAN JUDICIARY. By Simeon E. Baldwin. New York: The Century Co. 1905. pp. xiii, 403. 8vo.

Within the compass of three hundred and eighty-five small pages, Judge Baldwin has succeeded in condensing a treatise upon the American judicial system. As the work was written for the American State Series, the purpose of which is to interest the general public and the elementary student by popular descriptions of our governmental organization, the author has not attempted to do more than state clearly the nature and structure of the judicial branch of the government. For this reason, the book contains little of profit to the advanced student or the lawyer.

- AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE, illustrated by Numerous Cases. By the late William Wills. Edited by his son, Sir Alfred Wills. Fifth English Edition (1902). With American Notes by George E. Beers and Arthur L. Corbin. Boston, Mass.: The Book Company. 1905. pp. xii, 448. 8vo.
- ELEMENTS OF LAW considered with reference to Principles of General Jurisprudence. By Sir William Markby. Sixth Edition. Oxford: At the Clarendon Press. London, New York, and Toronto: Henry Frowde. 1905. pp. xii, 436. 8vo.
- FEDERAL SUPERVISION OF INSURANCE COMPANIES. An Address to the National Convention of State Insurance Commissioners, at Breton Woods, N. H., Sept. 27, 1905. By Frederick H. Nash. Boston. 1905. pp. 28.
- HINTS FOR FORENSIC PRACTICE: A Monograph on Certain Rules Appertaining to the Subject of Judicial Proof. By Theodore F. C. Demarest. New York: The Banks Law Publishing Company. 1905. pp. x, 123. 12mo.
- LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY. By A. V. Dicey. London and New York: The Macmillan Company. 1905. pp. xx, 508. 8vo.
- THE CONSTITUTIONAL DECISIONS OF JOHN MARSHALL. Edited with an Introductory Essay, by Joseph P. Cotton, Jr. In two volumes. New York and London: G. P. Putnam's Sons. pp. xxxvi, 462; v, 464. 1905. 8vo.
- CONSIDERATIONS IN APPRAISING DAMAGE TO FOREST PROPERTY. By B. E. Fernow. Reprinted from *The Forest Quarterly* for May, 1905. Sewanee, Tennessee: The University Press. pp. 24. 8vo.
- A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By Edwin H. Woodruff. Second edition, enlarged. New York: Baker, Voorhis, and Company. 1905. pp. xv, 620. 8vo.
- A HISTORY OF ENGLISH PHILANTHROPY from the Dissolution of the Monasteries to the Taking of the First Census. By B. Kirkman Gray. London: P. S. King & Son. 1905. pp. xv, 302. 8vo.
- THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS. (Being the Yorke Prize Essay for the Year 1902.) By C. T. Carr. Cambridge: At the University Press. 1905. pp. xiii, 211. 8vo.
- THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS at Law and in Equity. Second Edition. By John D. Lawson. St. Louis: The F. H. Thomas Law Book Co. 1905. pp. xxvi, 688. 8vo.
- THE REMINISCENCES OF SIR HENRY HAWKINS, BARON BRAMPTON. Edited by Richard Harris. London: Edward Arnold. New York: Longmans, Green & Co. 1905. pp. xi, 358. 8vo.
- INTERFERENCE IN TRADE. A Collection of Cases on Strikes, Boycotts, etc., with Notes. By Wm. Draper Lewis. Philadelphia: International Printing Co. 1905. pp. 96. 8vo.
- THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES. By Frank J. Goodnow. New York and London: G. P. Putnam's Sons. 1905. pp. xxvii, 480. 8vo.
- STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW. By H. Inglis Clark. Second Edition. Melbourne: Charles F. Maxwell (G. Partridge & Co.). 1905. pp. xv, 447. 8vo.
- A TREATISE ON EQUITABLE REMEDIES, in two volumes. By John Norton Pomeroy, Jr. Volume I. San Francisco: Bancroft Whitney Company. 1905. pp. xxx, 932. 8vo.
- JURISPRUDENCE, LAW, AND ETHICS. PROFESSIONAL ETHICS. By Edgar B. Kinkead. New York: The Banks Law Publishing Company. 1905. pp. vii, 381.
- NEW YORK STATE LIBRARY. YEARBOOK OF LEGISLATION 1904. Edited by Robert H. Whitten. Albany: New York State Education Department. 1905. 8vo.
- THE LAW OF FIRE INSURANCE. By George A. Clement. In two volumes. Volume II. New York: Baker, Voorhis, and Company. 1905. pp. cxvii, 807. 8vo.

- ADDRESSES, HISTORICAL, POLITICAL, SOCIOLOGICAL. By Frederic R. Cou-
dert. New York and London: G. P. Putnam's Sons. 1905. pp. xviii,
952. 8vo.
- CASES ON QUASI-CONTRACTS. Edited with Notes and References, by James
Brown Scott. New York: Baker, Voorhis, and Company. 1905. pp. xvi,
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- THE AMERICAN LAW RELATING TO INCOME AND PRINCIPAL. By Edwin A.
Howes, Jr. Boston: Little, Brown, and Company. 1905. pp. xviii, 104.
12mo.
- AMERICAN RAILROAD RATES. By Walter Chadwick Noyes. Boston: Little,
Brown, and Company. 1905. pp. 277. 8vo.
- CRIMINAL RESPONSIBILITY. By Charles Mercier. Oxford: At the Clarendon
Press. 1905. pp. 232. 8vo.

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EQUITABLE CONVERSION.¹

VI.

IT has often been declared judicially that the equitable conversion of money into land has the effect of vesting the equitable ownership of the land in him in whose favor the conversion is made, and not unfrequently the same effect, *mutatis mutandis*, has been attributed to the equitable conversion of land into money. Moreover, the courts which have so declared, while they have generally had before them no more than a single concrete case of equitable conversion, have made the declaration broadly, and as applicable to equitable conversions of every kind, or, at least, they have not intimated that the doctrine which they were declaring involved any division of equitable conversions into classes, nor that there was any class of such conversions to which the doctrine was not applicable. In order, however, to test the correctness of the doctrine, it is necessary to consider it in its application to each of the two great classes of equitable conversions, namely, those which are direct and those which are indirect; and, for the purpose of considering it in its application to such equitable conversions as are indirect, it will be desirable to separate the latter, as I have done in a previous article,² into such as are caused by the common bilateral contract for the purchase and sale of land, those which are caused by a unilateral covenant to purchase or sell land, and those which are caused by means of a trust or duty to purchase or sell land.

¹ Continued from 19 HARV. L. REV. 96.

² 18 HARV. L. REV. 250-268.

When a contract is entered into for the purchase and sale of land, and the purchaser dies pending the contract, it has always been held, as we have seen,¹ that his heir or devisee is entitled to enforce the contract against the seller for his own benefit, and at the expense of the purchaser's executor, and this has been supposed to involve the doctrine that the land passes in equity from the seller to the purchaser the moment when the contract is made, and so passes on the death of the latter to his heir or devisee, though I have endeavored to show² that it involves only the doctrine that, on the death of the purchaser, his right under the contract to have the land conveyed to him devolves in equity on his heir or devisee, just as the land would if the contract had been performed before the purchaser's death, though the purchaser's concurrent obligation to pay the purchase money devolves, both at law and in equity, on his executor. If I am right in this, it will follow that the decisions which have been made in favor of the purchaser's heir or devisee establish only that such heir or devisee is entitled to enforce the contract specifically for his own benefit, — not that he is the owner in equity of the land purchased. But, however that may be, it is important to ascertain how the question stands upon principle. Clearly, the burden rests upon those who assert that the contract itself has the effect of passing the land in equity, to show some principle of equity which gives the contract that effect. What do they show? They say equity considers as done whatever is agreed to be done. Equity, however, has no such principle as that, and the only one which resembles it is the principle that whatever is agreed to be done equity considers as done at the time when it is agreed to be done,³ and when, consequently,

¹ 18 HARV. L. REV. 250-251.

² *Ibid.*

³ The case of *Gibson v. Lord Montfort*, 1 Ves. 485, is very instructive in this connection. The question there was whether the heir or the devisee of a deceased testator was entitled to certain land which the testator had contracted for before making the first codicil to his will, — which, however, was made before the contract was performed, and even before the date fixed for its performance; and the question between the heir and the devisee was supposed to depend upon whether the land passed to the testator in equity before the date of the first codicil; and Lord Hardwicke said (p. 494): "The contract was before the first codicil, and went a great way to end the question. But the first codicil came before the time for the execution of these articles, which is the only difficulty; for, though things agreed on are looked upon as executed here, yet this is not such an agreement as could be executed at that time, the time for execution not being come; but that seems too nice, for, on a contract for lands, if the party die before the time for making the conveyance comes and without a will, the court considers it for the benefit of the heir that the land should be purchased for him, and, if so, why not for the devisee?" It seems plain, therefore, that Lord Hardwicke

it ought to be done, and it is needless to say that that principle furnishes no warrant for saying that the contract in question passes the land in equity the moment when it is made, especially as a considerable length of time always elapses between the making and the performance of a contract for the purchase and sale of land, and the contract, if properly drawn, always names a future day when the purchase shall be completed. Moreover, the question is whether the land passes to the purchaser in equity at the moment when the contract is made, — not whether it passes to him at any subsequent time, for it is confessedly at the moment when it is made that the contract works an equitable conversion, and it is because it works an equitable conversion that it is supposed to pass the land in equity, nor is it possible to assign any other time for the passing of the land in equity prior to the time fixed for the completion of the purchase. Finally, if, as will be shown to be the fact, an equitable conversion of money into land by means of a unilateral covenant to purchase land or by means of a trust or duty to purchase land never passes the land in equity, this will prove that there is no necessary connection between the indirect equitable conversion of money into land and the passing of the title to the land in equity, and that the former can take place without the latter; and yet practically the only reason why the courts have declared that a contract for the purchase and sale of land passes the land in equity is that they supposed that to be the only theory upon which the heir or devisee of a purchaser who dies pending the contract, can enforce the latter for his own benefit. Upon the whole, then, it seems pretty clear upon principle that a contract for the purchase and sale of land has no other effect in equity than it has at law unless and until it is broken by the seller's failure to convey the land according to his agreement, and unless the purchaser die before any such breach, though, in the latter event, the purchaser's right under the contract will devolve in equity upon his heir or devisee as before stated.

professedly decided the case upon authority, and not upon principle, *i. e.*, he regarded it as settled by authority that if the testator had died the day on which he made the codicil, but without making it, the land would have descended to the heir, and, if so, it ought to pass by the first codicil to the devisee.

So in *Goodwyn v. Lister*, 3 P. Wms. 387, Lord Chancellor Talbot said (388): "Whenever one man enters into articles for the sale of an estate, and agrees to convey it to another, in consideration of a sum of money engaged to be paid by that other person; *from the time the articles ought to be performed*, the one becomes entitled to the estate, and the other a creditor for the purchase-money."

What is the effect in equity of the contract for the purchase and sale of land upon the seller's right to receive the purchase money, over and above the effect of the same contract at law? It seems that it is nothing. The courts have, indeed, tried hard to persuade themselves that, as such a contract passes the land in equity to the purchaser, so it passes the purchase money in equity to the seller. It has (for example) been a favorite saying with them that, from the moment when such a contract is made, the seller becomes a trustee of the land for the purchaser, and the purchaser becomes a trustee of the money for the seller; but they have never been able to show that the second part of this proposition has any meaning or has borne any fruit, nor, in truth, has it any meaning nor has it ever borne, nor can it ever bear any fruit, and the reason is obvious, namely, that, while the seller has the same right to have the purchase money paid to him that the purchaser has to have the land conveyed to him, there is this difference between the land and the money, namely, that the land is identified while the money is not, and that difference renders it impossible that the seller should own the money, either at law or in equity, while it remains in the hands of the purchaser, or that the purchaser should hold any specified money in trust for the seller as such. Before the seller can become entitled to be paid any specific money by the purchaser, there must be an appropriation of some specific money to the purpose of paying for the land, and such an appropriation can be made only by the combined action of the purchaser and the seller.

I have heretofore stated¹ what will become of the purchase money in the event of the seller's dying pending the contract, *i. e.*, that his right under the contract will, like his other contractual rights, pass, at his death, to his executor, who will, in all respects, stand in the shoes of the deceased as to his right to receive the purchase money, and who will need only the same aid from equity that the deceased would have needed, namely, that of compelling an unwilling purchaser to pay for the land by enforcing the contract specifically, instead of leaving the seller or his executor to such special damages as a jury will give him for the loss of the bargain. The seller's executor does, indeed, stand in greater need of this aid from equity than the seller does, for, though the latter fail to obtain specific performance, he will still keep the land while,

¹ 18 HARV. L. REV. 9-10.

upon the death of the seller, the land will devolve, not upon his executor, but upon his heir or devisee; and, though it has been held that, if the executor cannot compel the purchaser to pay for the land, equity will compel the heir or devisee to convey the land to him, yet, as has been seen in a previous article,¹ it seems impossible to discover any principle which will warrant a court of equity in giving such relief.

If a person covenants that he will lay out a given sum of money in the purchase of land and will settle the land in such manner as is stated in the covenant, or if a trust be created for the same purpose, it is certain that no land will pass in equity to any of the persons in whose favor the settlement is to be made until the land is actually purchased pursuant to the covenant or trust, for until then it is wholly uncertain what land will be settled. That no title to land can pass from one person to another, either at law or in equity, until the land is identified, is so plain a proposition that it requires only to be stated in order to gain the assent of every intelligent person. Fortunately, however, it is not necessary, in this instance, to rely merely upon the intrinsic merits of the proposition for establishing its truth, for the proposition that no title passes, in the case now under consideration, is established by an experience which no one can gainsay. In an English settlement of land, the estates limited consist, as we have seen,² almost wholly of estates for life and estates tail. These estates, moreover, originally differed but little from each other in respect to the rights of the tenant in possession, for the time being; and, though tenants in tail, if in possession and of full age, have now for centuries been able to exercise complete control over the estate, yet they can do so, even to this day, only by first converting the estate tail into an estate in fee simple. How can this be done? It can now be done by simply executing and acknowledging a disentailing deed, and having the same enrolled, but, prior to Jan. 1, 1833, it could be done only by levying a fine or suffering a common recovery, *i. e.*, by levying a fine a tenant in tail could cut off his issue in tail, and so convert the estate tail into a base fee, and by suffering a common recovery, he could cut off, not only his issue in tail, but also all those in remainder or reversion expectant upon the termination of the estate tail, and so convert the latter into an estate in fee simple absolute. Could a fine be levied or a recovery suffered, however,

¹ 18 HARV. L. REV. 252-254.

² 18 HARV. L. REV. 257.

by a tenant in tail who was so in equity only, the legal estate being in a trustee? Such a tenant could go through the forms of levying a fine or suffering a recovery, but his acts would be wholly inoperative at law, as courts of law would regard him as having no estate whatever in the land. Courts of equity, however, could never have permitted equitable estates tail to be created, if a consequence had been that they would be inalienable; and accordingly they held¹ that a fine levied or a recovery suffered by an equitable tenant in tail was perfectly valid in equity, *i. e.*, that it had the same effect in converting the equitable estate tail into an equitable estate in fee simple that a fine levied or a recovery suffered by a legal tenant in tail has in converting the legal estate tail into a legal estate in fee simple. Suppose, then, a covenant or trust to have been created, any time in the eighteenth century, for laying out money in the purchase of land, and for settling the land, and that, if the covenant or trust had been performed, one A, a person of full age, would have been tenant in tail in possession of the land, but that the covenant or trust had not been performed and A did not wish to have it performed, but wished to receive the money instead. Prior to the time of Lord Cowper, he could have obtained payment of the money by filing a bill and obtaining a decree for its payment to him; but Lord Cowper refused to allow such bills, or rather to make such decrees,² thinking them to be in violation of the rights of those claiming, or who might in future claim, under the subsequent limitations of the settlement, covenanted or directed to be made, or of those who owned the reversion, if any, expectant on the termination of all the limitations of the settlement. How then could A obtain the money, if it was money and not land that he wanted? for he was clearly entitled to obtain it in some way. If it was true that A's right under the unperformed covenant or trust already consisted in the ownership of land in equity he could suffer a recovery of his existing equitable interest, and then, having become the person solely interested in the performance of the covenant or trust, and having also destroyed the reversion, if

¹ "Trust estates are by their nature incapable of the process of fines or recoveries. Yet fines are levied, and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates." Butler's note to Co. Litt. 290 b, s. XVI. In *Pearson v. Lane*, *infra*, p. 247, the fine was levied, and in *Henley v. Webb*, *infra*, p. 239, the recovery was suffered, by one who had only an equitable estate in the land.

² *Colwall v. Shadwell*, cited in *Short v. Wood*, 1 P. Wms. 471, and in *Chaplin v. Horner*, *ibid.* 485. See also *per Lord Hardwicke* in *Cunningham v. Moody*, 1. Ves. 174.

any, expectant on the termination of the limitations covenanted or directed to be made, he could elect not to have the covenant or trust performed, and require the money to be paid over to him. Was this course open to him? No, it seems never to have been supposed or claimed by anyone that it was; but, on the contrary, it was admitted on all hands that the only way in which A could convert his right into an absolute ownership of the money was by first enforcing specific performance of the covenant or trust, and then suffering a recovery of the land, and, finally, selling the land; and experience proved that the most feasible way of doing this often was for A to procure some landowner to convey an estate to the person or persons bound by the covenant or trust, on receiving from him or them the money covenanted or directed to be laid out in land, but under an agreement with A that the latter should suffer a recovery of the land, and thereupon reconvey it to its original owner on receiving from him the money which he had received for the land. The first time that this device (which was called borrowing the estate in question) was resorted to, was in the case of — *v. Marsh*,¹ 1723, while the last which appears in print was *Henley v. Webb*,² 1820. In the latter, the report states that Henley, who occupied the position which I have supposed A to occupy, obtained from Sir J. Webb, Sept. 15, 1781, at the price of £14,200, being the sum which Henley was entitled to have laid out in the purchase of land, a conveyance in fee of an estate, — which Henley, on the same day, conveyed, at the same price, to the trustees of the £14,200, and soon afterwards suffered a recovery thereof, being equitable tenant in tail under the trustees; and, having thus obtained the fee simple of the estate, he reconveyed it to Webb at the same price at which he had purchased it, having in fact agreed to do so when he made the purchase, the intent of the transaction being to make himself master of the £14,200.

I trust that the reader will not want any better proof than the foregoing case affords that Henley's right to have the £14,200 laid out in the purchase of land, and to have the land conveyed to him in tail, did not make him a tenant in tail of land in equity. How, then, are we to account for the fact that we find the contrary so constantly asserted or assumed by courts of equity? I fear we shall have to account for it in the same way in which we have

¹ Reported by Peere Williams in a note to *Chaplin v. Horner*, 1 P. Wms. 486.

² 5 Madd. 407.

already had to account for so many errors, namely, by the fact that the courts of equity constantly assume that money which is only indirectly converted into land in equity is so converted directly, — in which case the money would in truth be land in equity, *i. e.*, for the purposes of devolution. In *Henley v. Webb*, for example, if the fact had been that Henley had recently died, and the court was called upon to decide, and did decide, that, at his death, the £14,200 devolved upon his issue in tail and the court thought it necessary to give a reason for its decision, the reason would undoubtedly have been that the £14,200 was land in equity. Why, then, could not Henley have suffered a recovery of the £14,200 in its quality of land, thus avoiding the expense, vexation, and delay, and even the risk of failure by his death, necessarily incident to the circuitous proceedings detailed in the report? Because a recovery never could be suffered, even in equity, of what was in fact money, though it were, by means of a fiction, deemed land in equity.¹ It was only of specific and identified real estate, *i. e.*, real estate in fact, that a recovery could be suffered or a fine levied, and courts of equity differed from courts of law on that point only in holding that an equitable title to such real estate in the person levying the fine or suffering the recovery was sufficient to render the fine or recovery valid in equity. The reader will see, therefore, that, when money is covenanted or directed to be laid out in land and the land to be settled, it is when the money is thus laid out, and not till then, that any of the persons in whose favor the covenant is made, or the direction given, first become, by virtue of such covenant or direction, owners of land in equity in any other than a purely fictitious sense, even assuming that the money may, by a fiction, properly be termed land in equity before it is actually laid out in land.

When a covenant or trust, instead of being to lay out money in the purchase of land, and to settle the land, is to sell land and make some disposition of the proceeds of the sale, it is equally clear that none of those in whose favor such proceeds are to be disposed of can possibly acquire the ownership, either at law or in equity, of any specific money until the land is actually sold, as, until then, there will be no identification of any money. This fact,

¹ "A fine cannot be levied of money agreed to be laid out in a purchase of land to be settled in tail; but a decree can bind such money equally as a fine alone could have bound the land in this case, if bought and settled." *Per* Sir John Trevor, M. R. in *Benson v. Benson*, 1 P. Wms. 130.

however, is not material in respect to the devolution of the rights created by the covenant or trust, as those rights will devolve in the same manner, both at law and in equity, before the sale of the land as the proceeds of the sale will devolve after the sale, namely, upon the executor of the deceased. That this is so as to the equitable conversion of the seller's land into money, caused by the ordinary bilateral contract for the purchase and sale of land, we have already seen,¹ and the same thing is true of every indirect equitable conversion of land into money. In respect, therefore, to the devolution of property indirectly converted in equity, our view need not be extended beyond the conversion of personal property into real property, and, in respect to devolution by will, the field is still more narrowed. In respect, indeed, to the equitable conversion of money into land, caused by the bilateral contract for the purchase and sale of land, the right created by the contract in favor of the purchaser is always devisable,² and it seems that it will pass by a specific devise of the land contracted for, or by a devise of all the testator's real estate, or of all his real estate in such a place, provided the land contracted for is in that place, or by a devise of the right itself under any words of description which sufficiently identify it; but it seems that it will not pass under any words which are applicable only to personal estate, unless the testator so identifies the right as to show that he means to pass it by such words; for there will be no equitable conversion of the purchaser's money into land, unless he be entitled to enforce the contract specifically, and, if he be so entitled, the right created by the contract in his favor will necessarily be a hereditament, *i. e.*, a right descendible to the heir.³

¹ 18 HARV. L. REV. 10, 255.

² *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Ch. Cas. 39, 3 Ch. Rep. 4; *Lady Fohane's case*, cited in 1 Ch. Cas. 39; *Greenhill v. Greenhill*, 2 Vern. 679; *Prideux v. Gibben*, 2 Ch. Cas. 144; *Potter v. Potter*, 1 Ves. 274, 437, 3 Atk. 719; *Gibson v. Lord Montfort*, 1 Ves. 485.

³ In *Rushleigh v. Master*, 1 Ves. Jun. 201, 3 Bro. C. C. 99, by marriage settlement, £5,000, a part of the wife's marriage portion, was vested in trustees in trust to lay the same out in land to the use of the husband for life, remainder to wife for life, remainder, in the events which happened, to husband in fee; and hence the money belonged absolutely to the husband, subject only to an equitable conversion of it in favor of the wife for her life in the event of her surviving the husband, — which she did. It was assumed, however, that the money was wholly converted into land in equity, not only as to the wife, but as to the husband as well. In short, it was assumed that the money had ceased to have in equity the quality of money, having acquired the quality of land instead; and accordingly, the husband having died intestate as to the £5,000, it was assumed that it descended to his heir as land; and the question was whether it passed

In respect, however, to equitable conversions of money into land by means of unilateral covenants and trusts, it is to be observed, first, that such covenants and trusts are nearly always for the purchase and settlement of land, and that in all such cases the equitable conversion of the money into land is, on principle, confined to the estates for life and estates tail covenanted or directed to be limited by the settlement, and hence the rights created by such covenants and trusts are, on principle, never devisable, though the courts hold, as we have seen,¹ that the entire interest in the money is, in such cases, converted in equity into land, not only as to those in whose favor the land is covenanted or directed to be settled, but also as to the settlor and those claiming under him. Secondly, a devise of land which has any reference to "place" will not pass a right created by a covenant or trust to purchase and settle land,² as there is, in such a case, no identified land, and yet the testator shows, by his reference to place, that it was only actual and identified land that he intended to devise. Nor can such a right, as it seems, pass under words of bequest, *i. e.*, words which are applicable only to personal estate, unless the testator shows affirmatively that he intends to pass such right under such words;³ for

as land under the will of the heir, the same having never been laid out in land; and it was held that it did so pass, namely, under the words "all other my messuages, lands, tenements, and *hereditaments*," Lord Thurlow saying that (1 Ves. Jun. 404 a) if the testator had said, "all my estates in law and equity," this would have passed; and the words "all my estates whatsoever and where soever" are equally strong. He also uses the word "*hereditament*," and this is a *hereditament*, for it is descendible.

¹ 18 HARV. L. REV. 261, 270; 19 HARV. L. REV. 24, proposition 8.

² I fear, however, this statement must rest upon principle rather than authority. In *Guidot v. Guidot*, 3 Atk. 254, Lord Hardwicke decided that money which he held to be converted into land passed, under the will of the owner, by the words, "Lands lying in Islington, and in Elsfield in Hampshire, or elsewhere." I say "money which he held to be converted into land," for Lord Hardwicke treated the money as converted "directly" into land, and therefore as having passed in its quality of land. He said (256): "If it had not been for the locality, estates in Middlesex and Hampshire, no doubt could have arisen; but then follows 'or elsewhere,' which is the most comprehensive word he could have used. It is said the lands do not lie anywhere, for they are not yet purchased. When people make such descriptions as the testator had done here, they intend to pass everything they have in the world; now the money is somewhere, and that by the transmutation of this court is changed into land."

If the case had been one in which the testator had merely a right to have money exchanged for land, and to have some estate in the land conveyed to him, Lord Hardwicke's reasoning would clearly not have been applicable to it. Such a right is not situated anywhere, as it is incorporeal. The case of *Lingen v. Sowray*, 1 P. Wms. 172, involved the same point as *Guidot v. Guidot*, and was decided the same way.

³ *Biddulph v. Biddulph*, 12 Ves. 161; *In re Greaves's Settlement Trusts*, 23 Ch. D. 313, 316, *per* Fry, J.; *In re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244;

the owner of such a right has no ownership of the money with which the land is to be purchased, even if such money is identified. Yet here again we are confronted with the fact that the courts unwarrantably extend the doctrine of the equitable conversion of money into land by means of directions contained in wills to cases in which no person has a right to enforce such directions, *i. e.*, to require an actual conversion to be made;¹ and, in all such cases, the courts are forced to treat the equitable conversion which they assume to exist as if it were created by equity itself, *i. e.*, as if it were direct, and hence to treat the money, for the purposes of devolution, as if it were actually land in equity, instead of being merely liable to be exchanged for land, and, when that step has once been taken, it is not difficult for the courts to take another step and say that a testator who, if there were in truth an equitable conversion, would have only a right to have the money laid out in land, and to have the land settled, is the owner of the money itself, and, therefore, that, while such money will descend as land in case of intestacy, yet its owner may devise it as land or money at his pleasure. This seems to be the only way of explaining the decisions of Sir G. Jessell, M. R., and the Court of Appeal in *Chandler v. Pocock*.² If the money in that case had been in truth indirectly converted into land in equity, and the settlor's daughter had merely had a right to have land purchased with the money and settled, and the case had been so regarded, it would have been quite impossible for the courts to hold that such right passed under a bequest of all the daughter's personal estate. I have endeavored, however, to show, in another place,³ that there was no indirect conversion of the money into land in equity, and the same thing may be proved, even more conclusively, in another way; for the daughter's father settled the original land only upon himself, the daughter's husband and the daughter, for their respective lives, retaining in his own hands the reversion in fee expectant upon the determination of those three life estates; and, when the land was sold under the power contained in the settlement, of course the proceeds of the sale took the place of the land, and, when the

Chandler v. Pocock, 15 Ch. D. 491, 499, where Jessell, M. R., after expressing himself to the effect stated in the text, adds: "Not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old."

¹ 19 HARV. L. REV. 24, proposition 8.

² 15 Ch. D. 491, 499, 16 Ch. D. 648.

³ See 19 HARV. L. REV. 95.

daughter died and her will took effect, the last of the three rights created by the settlement came to an end, the husband and father having previously died. It was impossible, therefore, that anything should pass, under what was held to be an appointment by the daughter's will, except the fund produced by the sale of the land, and that was all that was held to pass; and, though all the difficulty arose from its being held, erroneously, as it is conceived, that that fund had been converted in equity into land, yet it was the assumption that the fund was land in equity that made possible a decision which would have been impossible on the supposition that the same fund, instead of being land in equity, was merely liable to be exchanged for land.

When a contract, trust, or duty to convert money into land or land into money is not performed as soon as those in whose favor the conversion is to be made are entitled to have it performed, what compensation are the latter entitled to receive for the delay? In the case of a bilateral contract for the purchase and sale of land, neither party can claim any compensation for non-performance by the other until the latter is in default, *i. e.*, has broken the contract, and, as the two sides of the contract are to be performed concurrently, neither party can put the other in default until he has done everything towards performing his own side of the contract that he can do without the co-operation of the other. If, therefore, either party desires a prompt performance by the other, he should, as soon as the time for performance arrives, seek the other, and notify him of his own readiness, willingness, and ability to perform his side of the contract, and should offer to do so if the other will concurrently perform his side, and, if the latter refuses or neglects to do so, he will be in default. If a place, as well as a time, for performance have been agreed upon, each party must at his peril, unless the contract have, in the meantime, been performed, or the other party put in default, be at the place agreed upon at the close of business hours on the day agreed upon, and, if the other party be not there, he will then be in default. And when either party is thus put in default, the other will be in a condition to maintain an action at law for damages, or a bill in equity for specific performance, at his option, and, in case of the latter, he will, besides specific performance, obtain such compensation for the other's breach of contract as shall be just.

In the case of a unilateral covenant to purchase land, the covenant will be broken by any failure of the covenantor to

perform it according to its terms, and, if there be also a covenant to settle the land when purchased, he who would have been entitled to the immediate possession and enjoyment of the land, if purchased in accordance with the covenant, will be entitled, immediately on the breach of the covenant, to file a bill and obtain a decree for its specific performance, together with a compensation for the breach, and the proper measure of such compensation will, it seems, be the interest on the money covenanted to be laid out in land from the time when the plaintiff was entitled to have the land purchased to the time when it is actually purchased. If the breach shall consist only in not settling the land when purchased, the same person will be entitled to all the remedies incident to an equitable ownership of land.

The reader must, however, bear in mind that such unilateral covenants are commonly contained in marriage articles and marriage settlements, made by the intended husband, and that the land to be purchased is almost always covenanted to be settled, in the first instance, on the husband for life; and, therefore, there can be no breach of the covenant till the husband's death.

In the case of a trust or duty to purchase and settle land, or to sell land and dispose of the proceeds of the sale, it is plain that the creator of the trust or duty intends that those in whose favor the land to be purchased is to be settled, or in whose favor the proceeds of the land to be sold are to be disposed of, shall enjoy the money to be laid out in land from the time when it is first authorized to be so laid out to the time when it shall be actually laid out, or shall enjoy the land directed to be sold from the time when it is first authorized to be sold to the time when it is actually sold. How shall the creator of the trust or duty give effect to such his intention? Clearly, he can do so in one way only, namely, by making a gift of the money or the land, *i. e.*, of the income of the one or the other, for the period of time just specified, to the person or persons who would have been entitled to receive the income of the land, if the money had been laid out in land, or to receive the income of the proceeds of the sale, if the land had been sold, as there would otherwise be a resulting trust as to such income in favor of the creator of the trust or of his representative, or, if a duty be created, instead of a trust, the land to be sold or the money to be laid out will continue to be the property of the creator of the duty, or of his representative, both at law and in equity, until the land is actually sold or the money laid out.

Accordingly, all well-drawn wills or deeds, creating such trusts or duties, contain such a gift in express terms.¹ Suppose, however, the creator of a trust or duty omits to make any such gift? It seems to be clear that the gift ought to be implied.²

It may happen that the creator of a trust or duty, instead of making such a gift of the intermediate income of the money to be laid out in land or of the land to be sold, as is indicated in the preceding paragraph, directs that the money to be laid out shall comprise not merely the principal sum named, but also the intermediate income thereof, or that the money to be disposed of shall comprise, not only the proceeds of the land to be sold, but also

¹ *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Guidot v. Guidot*, 3 Atk. 254; *Doughty v. Bull*, 2 P. Wms. 320; *Coventry v. Coventry*, 2 Atk. 366; *Thornton v. Hawley*, 10 Ves. 129; *Williams v. Coade*, 10 Ves. 500; *Biddulph v. Biddulph*, 12 Ves. 161; *Kirkman v. Miles*, 13 Ves. 338; *Maugham v. Mason*, 1 Ves. & B. 410; *Hereford v. Ravenhill*, 1 Beav. 481, 5 *ibid.* 51; *Wrightson v. Macaulay*, 4 Hare 487; *Batteste v. Maunsell*, Irish Reports, 10 Eq. 97, 314.

² A gift of the proceeds of a sale of land to A for life is a gift to him of the rents and profits of the land till sale. *In re Searle*, [1900] 2 Ch. 829. This appears to be the true explanation of the decision in *Earl of Coventry v. Coventry*, 2 Atk. 366, where a testator, being seised in fee of the manor of A, and having a lease of the manor of B, directed his executors to exchange his manor of A for the reversion of the manor of B. The manor of B, of which the Church of Lincoln was seised in fee, was situated in Oxfordshire, while the manor of A was situated in Lincolnshire and near the Church of Lincoln, and, for this or some other reason or reasons, the testator seems to have had no doubt that the exchange which he directed would be for the advantage of the Church of Lincoln, and, in fact, he gives as a reason for directing the exchange that he desired "to be a benefactor to the Church of Lincoln"; and it appears, therefore, not to have occurred to him that the Church of Lincoln might decline to make the exchange. Nevertheless, the Church of Lincoln did so decline, and its declination was the cause of the present suit. The testator had directed that, when the exchange was made, the reversion of the manor of B should be settled on his wife for life, remainder to his issue male by her in special tail, with divers remainders over; and, under these limitations, the manor of B would, if the exchange had been made, have been vested in the plaintiff for life in possession, remainder to his issue in tail male; and, as the exchange could not be made, the plaintiff insisted that he was entitled to the manor of A; and it would seem that, on the principle stated in the text, he was entitled to the possession and income of the manor of A until the exchange could be made, and, if that time never arrived, he and those claiming under him would be entitled to hold possession of the manor of A in perpetuity; and Lord Hardwicke so decreed, saying (369): "Where a sum of money is given by the will of a testator to be laid out in the purchase of lands, or of lands in a particular county, and after they are bought to be settled upon such and such persons, if a bill is brought here, the constant ordinary course is to direct a purchase, and the produce of the money to go as the land itself, till purchased. This comes very near the present case. . . . It is carried too far, when it is said, no exchange can ever be made, for there is no time fixed for it, and therefore there may come a prebendary at Lincoln, who may consent to the exchange."

the intermediate income of the land;¹ and, in such a case, the income of the money or land must, of course, be accumulated till the money is laid out, or the land purchased. But, in the absence of an express direction to the contrary, it is clear that the intermediate income will go in the manner indicated in the preceding paragraph.

In the case of *Pearson v. Lane*,² land was conveyed to trustees in trust to sell the same, and lay out the proceeds in other land, and settle the latter on the grantor for life, remainder to the first and other sons of the grantor and his then wife successively in tail, remainder to their daughters as tenants in common in tail, remainder to the grantor in fee. Twenty-four years afterwards the grantor died, leaving two daughters, and thereupon, no sale of the land having been made, the daughters and their husbands levied fines of the land, and, twenty years later, the question arose whether the fines were valid, and had made the daughters equitable owners of the land in fee simple absolute. And that was supposed to depend upon whether the daughters had an equitable freehold in the land when the fines were levied. If the land had been sold, and its proceeds reinvested in other land, as directed, the daughters would have become, on their father's death, equitable tenants in tail in possession of the land purchased, under their father's deed of trust, and equitable owners of the reversion in fee by descent from their father. Had they any estate in the land of which the fines were levied? Clearly, the deed of trust gave them none, either at law or in equity. What, then, became of the equitable fee in that land immediately on the execution of the deed of trust? It resulted to the grantor, though subject to be divested by a sale of the land, as directed, and, on the grantor's death, it descended to his daughters, though subject to the same condition subsequent. By virtue of this equitable fee, the daughters could have levied fines, but fines levied by them would not have destroyed nor affected the condition by which their equitable title was liable to be defeated, for, the title of the trustees being legal, the fines would have been inoperative and void as to them. There was, however, one way, and one way only, in which they could obtain a perfect legal and equitable title to the land, namely, by filing a bill against the trustees and compelling them to convey

¹ *Short v. Wood*, 1 P. Wms. 470; *Pearson v. Lane*, 17 Ves. 101; *Biggs v. Andrews*, 5 Sim. 424.

² 17 Ves. 101.

the land to the plaintiffs, the ground for the bill being that, if the land were sold and other land purchased, the plaintiffs would be entitled to have the latter conveyed to them in tail, remainder to them in fee, and then they could, by levying fines, convert their estate tail into a fee simple absolute, and, therefore, as they could not levy fines effectively of the land held by the trustees, they were entitled to have the latter conveyed to them in fee simple without the levying of fines, their bill being a sufficient substitute for fines.

Sir W. Grant, M. R., held, however, that the daughters and their husbands had acquired a perfect title to the land by the fines which they had levied, he being of opinion that the daughters were equitable tenants in tail of the land when the fines were levied, and hence that the fines had made them equitable tenants in fee simple; and, though it does not appear that they had obtained any conveyance of the legal title, yet no objection was taken to the title on that ground, nor does the case give any information as to the trustees or their acts subsequent to the conveyance of the land to them. Upon what ground did Sir W. Grant hold that the daughters were equitable tenants in tail of the land when the fines were levied? Upon the ground, first, that, though the deed of trust gave them in terms no estate in the land to be sold, yet, as the trustees took only a naked legal title, and the equitable title must be somewhere, a court of equity would ascertain where it was by inquiring for whose benefit the trust existed, *i. e.*, who was the *cestui que trust*, and that here the grantee's daughters were the *cestuis que trust*, and consequently they took, under the trust deed, the same equitable estate that they would have taken in the land to be purchased, when purchased, namely, an equitable estate tail. To this, however, it may be answered that, though the daughters were *cestuis que trust* under the trust deed, yet they were to enjoy the land vested in the trustees only in the mode pointed out by the creator of the trust, namely, by its sale and the investment of the proceeds in other land, and that this was absolutely inconsistent with their having any interest in the land to be sold, except for so long as it should remain unsold.

Sir W. Grant says: ¹ "Where money is given to be laid out in land, which is to be conveyed to A, though there is no gift of the money to him, yet in equity it is his; and he may elect not to

¹ P. 104.

have it laid out: so, on the other hand, where land is given upon a trust to sell, and to pay the produce to A, though no interest in the land is expressly given to him, in equity he is the owner; and the trustee must convey, as he shall direct." Undoubtedly this is true,¹ but why? Because A, being made the absolute owner of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the direction to lay the money out in land, or to purchase land, is inoperative and void. As A alone is interested in the question whether the money shall be laid out in land, or whether the land shall be sold, so he alone has a voice in the decision of that question. It follows, therefore, that, while in terms the gift to A is only of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the gift to him is, in legal effect, of the money to be laid out, or of the land to be sold, the direction to lay out the one, or to sell the other, going for nothing. Why, then, does the law thus wholly change the subject of the gift, instead of simply giving effect to it according to its terms? Because the law cannot do the former for the reason just stated, and, therefore, it does the latter to prevent the purpose of the giver from being totally defeated. The law, therefore, changes the subject of the gift for the best of reasons, namely, *ut res magis valeat quam pereat*.

C. C. Langdell.

CAMBRIDGE, October, 1905.

¹ A gift of the proceeds of a sale of land is an absolute gift of the land itself *In re Daveron*, [1893] 3 Ch. 421, 424.

THE CREATION OF THE RELATION OF CARRIER AND PASSENGER.

AS in the case of other persons engaged in a public undertaking, so in the case of a carrier of passengers, responsibility begins upon the acceptance by the carrier, in some way or other, of the person who thus becomes a passenger. This may be an express acceptance by the present assent of the carrier or his servant, or it may be an acceptance by the carrier, in advance, of everyone who complies with the terms of a certain offer. The latter is the commoner method of accepting passengers. "A railroad company," as Mr. Justice Knowlton put it,¹ "holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, and at a proper place, to be carried."

Either by securing express acceptance of himself as a passenger, or by complying exactly with the terms of the carrier's offer, the passenger, to be such, must have come into a relation with the carrier based on the carrier's consent to receive him. Without such consent one cannot become a passenger, even though one has a legal right to be received. If, for instance, the carrier should violate his legal duty by refusal to receive a proper person as a passenger, the latter would have an action against the carrier, but the action could not be based upon the duty of a carrier to a passenger. The carrier's wrong consists not in violating the right of a passenger, but merely in violating the right to become a passenger, — a very different right.

This right to become a passenger is not the only right of a non-passenger against a carrier. One who intends to become a passenger at a future time may have an immediate right against the carrier of access to his office or conveyance, in order to make inquiries, to buy tickets, or to wait a reasonable time until the carrier is ready to receive him as a passenger. This right is incidental to the right to become a passenger. We shall see later that the exercise of the right does not necessarily and immediately make the person so exercising it a passenger.

¹ Webster v. Fitchburg R. R., 161 Mass. 298, 37 N. E. Rep. 165.

There are other non-passengers who have rights against the carrier, who do not themselves even intend to become passengers. Such are hackmen who come to the station to bring passengers, and relatives or friends who come to escort passengers to their vehicle or to meet them on arrival. Such rights as these, like the rights of the intending passenger, are incidental to the business of the carrier, and derive their existence from actual or contemplated passenger-rights.

It is not always easy to distinguish between the real passenger-rights and the subordinate incidental rights, or to say in some cases whether a party has become a passenger or is still in the exercise of a preliminary incidental right. But there is one important consequence of the passenger-right having come into existence, that is, the obligation of the passenger to compensate the carrier. This obligation is the consequence, not the cause, of the existence of the relation; but as it is sometimes easy to see that no obligation to pay has arisen, the absence of such obligation determines the nature of the relation. For the carrier is entitled by the law to compensation only for exercising his business as carrier; and all the incidental duties of which I have spoken must be rendered without compensation.

With this short preliminary statement of the principles governing our subject, let us examine certain classes of cases in which the existence of the relation has been brought in question.

Payment of Fare.

It must be evident that the purchase of a ticket does not of itself render the purchaser liable for the payment of fare at any particular time. He may take the next train, or wait for five years; he may use the ticket himself, or give it away; and it may never be used. The mere purchase of a ticket therefore does not make the purchaser a passenger;¹ and stress is laid on the purchase of a ticket, in several cases, merely because it is in the particular case evidence of a *bona fide* intention to become a passenger.

If the ticket is surrendered at a gate or door through which the person must pass to take the carrier's vehicle, this, it is clear, makes the person a passenger; since he then pays his fare, which he is only obliged to pay as a condition of being accepted as a passenger. The payment therefore proves such acceptance.²

¹ *Vandegrift v. West Jersey & S. R. R.*, 71 N. J. L., 60 Atl. Rep. 184.

² *Illinois Cent. R. R. v. Treat*, 179 Ill. 576, 54 N. E. Rep. 290.

On the other hand, the payment of fare is not necessary before a person becomes a passenger, but a passenger who takes a railroad train expecting to pay a fare has already the relation of a passenger to the company, though a conductor has not yet appeared to collect a fare; since such a person is liable to pay a fare upon demand, and is in fact making a tender of the fare at the moment of getting on board the vehicle. A delay of the conductor in collecting the fare is due simply to the convenience of the company, which might, if it chose, collect the fare from the passenger before permitting him to get on board the vehicle. The moment of beginning passage is the same, therefore, whether the fare is collected in advance, or is paid during the progress of the journey.¹

Waiting at Station for a Train.

It must be obvious that the relation of carrier and passenger may arise before actual transportation has begun. Thus, if a person who intends to be carried is on board a vehicle which is ready to start he has become a passenger, though the vehicle has not yet started.² So one who is on a steamboat at a wharf, ready to start, is a passenger, though the boat has not yet started.³

One who is in the waiting-room of a station, waiting to take the carrier's car, has been held to be a passenger,⁴ but the question involved was merely the right of such person to safe premises, or to proper treatment by the carrier's servants, and this right would exist independently of the relation of carrier and passenger. It is better, therefore, to speak of the obligation which the carrier owes "to one intending to become a passenger in one of its trains, who would have a right to use the waiting-room for a reasonable time before the arrival of the expected train."⁵ At any rate, if the intending passenger came to the waiting-room and remained there after the train had gone, he would clearly not be a passenger.⁶

¹ Mellquist v. The Wasco, 53 Fed. Rep. 546; Frink v. Shroyer, 18 Ill. 416; Ohio & M. R. R. v. Muhling, 30 Ill. 9; Russ v. Steamboat War Eagle, 14 Ia. 363 (passenger on board boat at end of first half of a round trip, waiting for the boat to start back, is a passenger, though the return fare is not paid); Hurt v. Southern R. R., 40 Miss. 391; Houston & T. C. R. R. v. Washington (Tex. Civ. App.), 30 S. W. Rep. 719.

² Massiter v. Cooper, 4 Esp. 260.

³ Hrebrik v. Carr, 29 Fed. Rep. 298.

⁴ Gordon v. Grand St. & N. R. R., 40 Barb. (N. Y.) 546; Norfolk & W. R. R. v. Galliher, 89 Va. 639, 16 S. E. Rep. 935.

⁵ Devens, J., in Heinlein v. Boston & P. R. R., 147 Mass. 136, 16 N. E. Rep. 698.

⁶ Heinlein v. Boston & P. R. R., *supra*.

It is commonly said that one who is on the platform of a railroad company, waiting for a train which he intends to take there as soon as it arrives, is a passenger.¹ Here, again, it may be doubtful whether he is strictly a passenger, or is not, rather, an intending passenger to whom the carrier owes the duty of providing a safe platform. The distinction is not usually an important one. It became so, however, in a peculiar case where a drover about to go in the car with cattle was walking past the engine to get on board his car when he was hit by a piece of wood negligently thrown from the engine. His drover's ticket exempted the carrier from liability. This exemption would become an agreement of the drover and binding upon him as soon as he used the ticket, or, in other words, became a passenger upon the terms of the agreement in the ticket. The court held that the exemption was effectual because he had already become a passenger.² It might be argued that on the special facts of the case the drover was already bound by the terms of the ticket, because he had already come under an obligation to the carrier to take passage on the train, in order to take care of the cattle, which were already loaded. The case, however, was decided upon the general principle that a person upon a station platform about to take a train is a passenger. If under such circumstances the person in question, finding that he had forgotten some article which he desired to take along with him, had abandoned his intention to take that train, and had left the station, could it be argued that he was bound to pay a fare to the railroad company on account of the abandoned trip? It would seem not; and if not, upon principles already stated he should not be held strictly a passenger.

An intending passenger who has bought a ticket, or is prepared to pay fare, and is passing over tracks of the company, under direction of its servants, or according to custom, toward the train which he is about to take, has been held to be a passenger.³ But in the absence of usage or of the directions of the carrier, even a person in a station would not become a passenger by crossing a track toward his train. Crossing railroad tracks is not ordinarily a safe or proper way to present oneself to a railroad as a pas-

¹ *Central R. R. v. Perry*, 58 Ga. 461; *Caswell v. Boston & W. R. R.*, 98 Mass. 194; *Carpenter v. Boston & A. R. R.*, 97 N. Y. 494.

² *Poucher v. New York C. R. R.*, 49 N. Y. 263.

³ *Allender v. Chicago, R. I. & P. R. R.*, 37 Ia. 264; *Warren v. Fitchburg R. R.*, 8 Allen (Mass.) 227.

senger; and in the absence of express acceptance where the party relies on the general invitation of the carrier, it cannot be supposed that the carrier invites persons to take its trains in any other than a safe and proper way.¹

One walking along the public street toward the station with the intention of taking the train is certainly not yet a passenger;² nor *a fortiori* is one who is proceeding across the tracks directly from the street to the train. In such a case the intending passenger must at least have been received on the premises of the company before proceeding upon the tracks if he is to be regarded as a passenger. One who, merely in order to reach in the quickest way the platform from which his train starts, crosses the carrier's tracks on his way from the sidewalk to the train, cannot be regarded as a passenger.³

Boarding a Moving Train.

If a person gets on a moving train after it has started, he is "outside of any implied invitation" on the part of the carrier, and does not at once acquire the rights of a passenger.⁴

In the Massachusetts case just cited, it is held that even his reaching the platform of the car safely does not give him those rights. "If he had reached a place of safety and seated himself inside of the car, the bailment of his person to the defendant would have been accomplished, so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him on the threshold, and had put himself in the proper place for the carriage of passengers."⁵

But a person in such a position, while unable to take advantage of the general invitation of the carrier, may of course become a passenger by being accepted as such by the proper agent of the carrier. If while standing on the steps he had been accepted as a passenger by the conductor, he would become a passenger; and the same result would follow if a brakeman attempted to help him

¹ Southern Ry. v. Smith, 86 Fed. Rep. 292 (he "did nothing to notify any of the officers or agents of the defendant company that he was even a prospective passenger").

² Southern Ry. v. Smith, *supra*; June v. Boston & A. R. R., 153 Mass. 79, 26 N. E. Rep. 238.

³ Chicago & E. I. R. R. v. Jennings, 190 Ill. 478, 60 N. E. Rep. 818; Webster v. Fitchburg R. R., 161 Mass. 298, 37 N. E. Rep. 165.

⁴ Merrill v. Eastern R. R., 139 Mass. 238, 1 N. E. Rep. 548.

⁵ Holmes, J., in Merrill v. Eastern R. R., *supra*, at p. 240.

to the platform. In the Massachusetts case it appeared that a brakeman had seen him and told him "to get out of the way so that the [brakeman] could do his work." This fact however was not regarded as making him a passenger; nor in another case was the fact that the person was seen by the conductor on the platform.¹

In other jurisdictions the courts are inclined to hold that a person becomes a passenger as soon as he reaches the platform in safety. This has been carried so far that if an intending passenger has wrongfully boarded a moving train, but has placed himself in a position of safety, and a servant of the carrier, intending to assist him, injures him, the person is regarded as having become a passenger.² And this has been held even where the carrier's servant instead of helping the person pushed him off; the person, having succeeded in getting aboard the train safely as a *bona fide* passenger, being treated as if he had done so before the train started.³

If a person is injured while attempting to board a moving train, or to get upon a train in such a way that he does not at that time become a passenger, but he eventually gets on board and is accepted as passenger by the conductor, this acceptance does not relate back to make such person a passenger *ab initio*, and therefore make the carrier responsible as carrier for the injury.⁴

Boarding a Street Car or Omnibus.

It was early held that when a man, intending to take passage in a vehicle which has stopped to receive him, puts his foot upon the step or his hand upon a hand-rail, he has been accepted as a passenger, and the responsibility of the carrier toward him as a passenger begins. The leading case is the English case of *Brien v. Bennett*.⁵ An omnibus had stopped for a passenger, and just as the passenger put his foot on the step the omnibus started, throwing the passenger to the ground; the carrier was held liable. The case has been universally followed.⁶

¹ Illinois C. R. R. *v.* O'Keefe, 168 Ill. 115, 48 N. E. Rep. 294.

² Pennsylvania R. R. *v.* Reed, 60 Fed. Rep. 694.

³ Sharrer *v.* Paxson, 171 Pa. 26, 33 Atl. Rep. 120.

⁴ Georgia Pac. Ry. *v.* Robinson, 68 Miss. 643, 10 So. Rep. 60.

⁵ 8 C. & P. 724.

⁶ Central Ry. *v.* Smith, 74 Md. 216, 21 Atl. Rep. 706; Gordon *v.* West End St. Ry., 175 Mass. 181, 55 N. E. Rep. 990; Davey *v.* Greenfield & T. F. St. Ry., 177 Mass. 106, 58 N. E. Rep. 172; Smith *v.* St. Paul City Ry., 32 Minn. 1, 18 N. W. Rep. 827; Steeg

When the carrier of a street railway or omnibus company sees the signal of an intending passenger, and stops to receive him, it would seem that the person whose signal is thus acted on by the carrier has at that moment become a passenger, even before he reaches the conveyance; for the act of the carrier in stopping the conveyance is an acceptance of the person as a passenger, and that person, having already induced the carrier to act for his benefit, has, it would seem, become responsible for the payment of fare. On each side, therefore, the relation of carrier and passenger has been established. This is in accordance with the reasoning of the court in the leading case of *Brien v. Bennett*,¹ where the carrier's omnibus had stopped at a signal from the plaintiff. Lord Abinger said, "I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger."

In accordance with this reasoning it has been held in most cases that the relation of carrier and passenger was established the moment the vehicle began to slacken its speed in response to the passenger's signal.² Where the invitation is express, there is no doubt of this. So where a train which was going slowly was flagged by an intending passenger, and the conductor told him to jump on, he became a passenger at once.³

In Connecticut and Massachusetts, however, it is held that though the car stops in response to a signal, the person for whom it stops does not become a passenger until he reaches the vehicle.⁴ In the Massachusetts case the judge at the trial charged that where the car had stopped to receive the intending passenger, "thereby making an offer to be received and an acceptance of that offer,"

v. St. Paul City Ry., 50 Minn. 149, 52 N. W. Rep. 393; *Ganiard v. Rochester, C. & B. R. R.*, 121 N. Y. 661, 24 N. E. Rep. 1092; affirming s. c. 50 Hun (N. Y.) 22, 2 N. Y. Supp. 470. And so of a person who steps upon the gang-plank of a steamboat: *Northwestern U. P. Co. v. Clough*, 22 Wall. (U. S.) 528; or upon the step of a steam railroad car: *Texas & P. Ry. v. Edmond* (Tex. Civ. App.), 29 S. W. Rep. 518.

¹ *Brien v. Bennett*, *supra*.

² *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. Rep. 996 ("the slackening of the speed in response to his signal was an invitation from the driver for him to board the car"); *White v. Atlanta St. R. R.*, 92 Ga. 494, 17 S. E. Rep. 672; *Chicago St. Ry. v. Williams*, 140 Ill. 275, 29 N. E. Rep. 672 ("it was a fair question for the jury whether, under all the circumstances, the plaintiff was not invited to get on the car. If he was so invited, he was a passenger"); *Butler v. Glen Falls, S. H. & F. E. S. R. R.*, 121 N. Y. 112, 24 N. E. Rep. 187; *Lewis v. Houston Elec. Co.* (Tex. Civ. App.), 88 S. W. Rep. 489.

³ *Kansas & G. S. L. R. R. v. Dorrough*, 72 Tex. 108, 10 S. W. Rep. 711.

⁴ *Donovan v. Hartford St. Ry.*, 65 Conn. 201, 32 Atl. Rep. 350; *Duchemin v. Boston E. Ry.*, 186 Mass. 353, 71 N. E. Rep. 780.

the intending passenger is entitled to the rights and protection of a passenger as he approaches the car to get on it, "at least so far as any defect in that car is concerned." The passenger in that case, while approaching the car, was injured by a sign falling from the car upon him. The Supreme Judicial Court of Massachusetts held the charge erroneous. In the course of his opinion Mr. Justice Barker said:

"A person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth or the street clear of obstructions to his progress than it owes to all other travelers on the highway. It is under no obligation to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such person, who has not yet reached the car, there is any other duty as to the car itself than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car but has not yet reached it. . . . We are unwilling to go farther than the doctrine . . . that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger any person actually taking hold of the car and beginning to enter it is a passenger."

The reasoning of the court has been given at length, because the case is of considerable practical importance in itself, and because the authority of the court, even when opposed to the current of decisions, is great. The arguments used should therefore be analyzed with care.

First, there is said to be no distinction between a passenger who has left a car and one who is about to take it. But the analogy of the carrier of goods makes this statement doubtful. When a carrier of goods accepts goods for immediate carriage, he at once becomes responsible as carrier, though the actual transportation may not begin until later; while at the end of the route he ceases to be liable as carrier and becomes responsible only as warehouseman at once on the ceasing of transportation, according to the view held

in Massachusetts, or at least after the lapse of a "reasonable" time, as certain jurisdictions hold. The same reason which leads to this distinction in the case of the carriage of goods would support it in the case of the carrier of passengers.

Second, it is doubtless true that the carrier would not be responsible for protecting the intending passenger from assault or negligent injury by persons on the street; but this is quite consistent with his having already become a passenger. The duty of the carrier to protect a passenger against third persons is not absolute, but is limited by the power of the carrier to protect by the use of reasonable effort. The carrier, not being in control of the street traffic, cannot reasonably be called upon to furnish protection against it. He would not be liable for an assault or negligent injury by a person on the street to a passenger actually on the car, under the circumstances supposed.

Third, the statement that the carrier is not entitled to compensation at once upon slackening his speed in response to a signal is very questionable. The carrier has been called upon to do something in the line of his business for a particular individual, a thing which only a passenger has a right to demand. It is admitted that the person would be a passenger the moment his foot touched the step, and therefore that the carrier would have a right to demand payment of fare; but the carrier has performed all the service for which this charge is made the moment he stops the car. It may be granted that it would be practically difficult to collect fare if the person in the street changed his mind and turned away before he reached the car; so it would be if he turned away after placing his foot on the step: but that is not saying that the carrier must stop his car gratuitously. If the Massachusetts opinion is correct, there would seem to be no law to prevent a street car being compelled to stop at every street crossing on its route without being entitled to compensation. There is really no proper distinction between the person who has not yet put his foot on the step and the person who has just done so; the consensual relation dates from the moment of mutual consent, that is, the moment of response to the signal.

It is clear, of course, that though the vehicle slackens its speed, if this is not done in response to a signal from the intending passenger, but independently, the intending passenger does not become entitled to the rights of a passenger. His *bona fide* belief that his signal has been seen and responded to is imma-

terial; he must actually secure the consent of the carrier to the relation.¹

Riding in a Place not Intended for Passengers.

When a person desiring to be transported enters a car or other part of a railroad train not intended for passengers, he does not thereby accept the carrier's invitation; and if there is no express acceptance of him as a passenger he is not entitled to be so treated. In a Texas case² it appeared that an intending passenger, having money to pay his fare, came late to the station, and was just able to get on board the front platform of the first car as the train started. This proved to be the front platform of a baggage-car. The fireman, discovering him, compelled him to jump off by turning hot water from a hose on him; and in jumping he was injured. The Court of Civil Appeals held that he could recover as a passenger. "While," they said, "the place one may be occupying upon the train at the time of his injury may be important in determining whether or not he intended to pay his fare, it does not conclusively fix his status, either as a passenger or a trespasser. It may be conceded that a person found in the position occupied by Eaton Williams at the time he was injured is subject to the suspicion of being a trespasser; but if such person, having the means and intending to pay his fare, can, as Eaton Williams in this case did, give a reasonable excuse for why he was not in a passenger coach, he will, in law, be a passenger, and entitled to protection against the wrongful acts of the railroad company and its employés. Neither the carrier nor its employés can assume that a person on any car of a passenger train is a trespasser, and, if they treat him as a trespasser merely because he is not in one of the cars provided for, and usually occupied by, a passenger, and injury results therefrom, and the facts show that he is a passenger, the railroad company will be liable."

¹ Jones v. Boston & M. R. R., 163 Mass. 245, 39 N. E. Rep. 1019; Schepers v. Union Depot R. R., 126 Mo. 665, 29 S. W. Rep. 712; Schaefer v. St. Louis St. Ry., 128 Mo. 64, 30 S. W. Rep. 331 ("the offer must be made to become a passenger on one part, and an acceptance on part of the company of the passenger on the other, before the relation of carrier and passenger can be said to exist"); Pitcher v. People's St. Ry., 154 Pa. 560, 26 Atl. Rep. 559, 174 Pa. 402, 34 Atl. Rep. 567 ("the company was entitled to some kind of notice of his intent to assume the relation of passenger before being charged with the duty of taking care of him as a passenger").

² Missouri K. & T. Ry. v. Williams (Tex. Civ. App.), 40 S. W. Rep. 350.

This decision was however reversed on appeal to the Supreme Court. One may become a passenger, the court said, by either an express or an implied contract. There was no express contract in this case; and "in order to raise such an implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers."¹

A case almost identical in its facts was decided in South Carolina between the first decision and the appeal in the Texas case; and largely on the authority of the Texas Court of Civil Appeals the plaintiff was held to be a passenger.² Chief Justice McIver dissented, taking the same ground on which the Supreme Court placed itself in the Texas case. If, he said, "the plaintiff, with his ticket in his pocket, had got on the pilot, or the engine itself, or upon the tender, or upon the express car, it certainly could not, with any propriety, be said that he had thereby established the relationship of passenger between himself and the company. Why? Simply because such places are not the proper places for passengers to be received or transported; and it seems to me that the same may be said of a baggage car. If, then, the relationship of passenger and carrier had not been established between plaintiff and defendant at the time of the accident, it is clear that the defendant company owed no duty to the plaintiff except such as it might owe him as a trespasser."

The reasoning of the dissenting opinion is hard to resist. The case is not like that of taking a wrong train by mistake; for there the person gets into a car intended for passengers, while here, as the Chief Justice pointed out, he knew that a baggage car was not prepared for the reception of passengers. The haste with which the plaintiff took the train has prevented him from so taking it as to make himself a passenger by bringing himself within the terms of the company's invitation. Yet it must be clear that he can be treated in no worse way than an innocent trespasser; and if wantonly injured by a servant of the company in the course of his employment, the carrier should be liable. It was urged in the dissenting opinion in the South Carolina case that the servant was

¹ *Missouri K. & T. Ry. v. Williams*, 91 Tex. 255, 42 S. W. Rep. 855. It is hard to see how the defendant could escape liability under the circumstances even by proving that the plaintiff was not a passenger; since the injury was wanton, and was apparently inflicted in the carrier's service.

² *Martin v. Southern Ry.*, 51 S. C. 150, 28 S. E. Rep. 303.

not acting in the course of the employment; but this view would seem to be mistaken.

The same facts came up in Illinois, and it was held that the person did not become a passenger by getting safely upon the platform.¹ "A passenger must put himself in the care of the railroad company, and there must be something from which it may fairly be implied that the company had accepted him as a passenger."

The distinction is to be noted between persons who having once become passengers then go without permission of the company into some place not provided for passengers, and persons who, intending to become passengers, go in the first instance to such a place. While the latter do not technically become passengers at all, since they never place themselves within the terms of the carrier's offer to receive them,² persons who have already become passengers do not forfeit that position by going into some car or some part of a car in which passengers are not allowed to ride. Such conduct may be negligent, and if the negligence contributes to an injury it may therefore bar recovery for the injury; but the recovery cannot be denied on the ground that the injured person was not a passenger.³

It often happens, however, that a person is received by the carrier's servant into a vehicle not prepared for passengers, and is permitted to ride there. Such a reception will of course make the person a passenger provided the reception is within the authority of the servant; either because of express permission given by the carrier, or because the reception is within the apparent authority of the servant.

A case of the first kind occurs when a railroad is accustomed to carry passengers in freight cars. Where such a custom exists, one received on a freight train is to be regarded as a passenger quite as much as one who rides on an ordinary passenger train.⁴

¹ Illinois C. R. R. v. O'Keefe, 168 Ill. 115, 48 N. E. Rep. 294. See Farley v. Cincinnati, etc., R. R., 108 Fed. Rep. 14.

² Bricker v. Campbell, 132 Pa. 1, 18 Atl. Rep. 983.

³ Kentucky C. R. R. v. Thomas, 79 Ky. 160 (express car); Bard v. Pennsylvania Traction Co., 176 Pa. 97, 34 Atl. Rep. 953 (bumper of street car); Little Rock & F. S. Ry. v. Miles, 40 Ark. 298 (top of freight car); Merrill v. Eastern R. R., 139 Mass. 238, 1 N. E. Rep. 548 (step of steam-car); New Orleans & N. E. R. R. v. Thomas, 60 Fed. Rep. 379 (top of cattle car).

⁴ Hazard v. Chicago, B. & Q. R. R., 1 Biss. 503; Reber v. Bond, 38 Fed. Rep. 822; Ohio & M. R. R. v. Mahling, 30 Ill. 9; Ohio & M. Ry. v. Dickerson, 59 Ind. 317; Missouri P. Ry. v. Holcomb, 44 Kan. 332, 24 Pac. Rep. 467; Whitehead v. St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. Rep. 751; Perkins v. Chicago, S. L. & N. O. R. R.,

A case of the second kind occurs when passengers are not uncommonly so carried on freight trains in that part of the country, and one is permitted to ride on such a train by the conductor. When for any reason the conductor has apparent authority to receive a passenger, and does so, the relation of carrier and passenger is established.¹

If a passenger is received by a servant of the carrier in a vehicle in which he knows that he has no right to ride, and that the conductor has no authority to permit him to ride, he does not become a passenger whether he pays fare or not. Thus where the conductor informs him that passengers are forbidden to ride on a freight train, but he persuades the conductor to let him ride nevertheless, he is not a passenger.² And on the same principle one is not a passenger who by permission of the carrier's servant or otherwise rides on a locomotive,³ a hand car,⁴ a flat car,⁵ or a construction train.⁶ In one case it appeared that the passenger was informed by a servant of the carrier that he could not, under the carrier's rules, attach his own freight car to a passenger train and ride in it, as he desired to do; but the servant afterwards permitted it. He was held to be a passenger.⁷ If the case can be supported, it must be on the ground that under the circumstances of the case he had reason to suppose that the permission of the carrier had been obtained.

60 Miss. 726; *Murch v. Concord R. R.*, 29 N. H. 9; *Edgerton v. New York & H. R. R.*, 39 N. Y. 227; *I. & G. N. Ry. v. Irvine*, 64 Tex. 529. So in a similar case of one riding on an engine: *Lake Shore & M. S. R. R. v. Brown*, 123 Ill. 162, 14 N. E. Rep. 197; or on a gravel train: *Lawrenceburgh & U. M. R. R. v. Montgomery*, 7 Ind. 474.

¹ *Dunn v. Grand Trunk Ry.*, 58 Me. 187; *Ohio V. Ry. v. Watson*, 93 Ky. 654, 21 S. W. Rep. 244; *Lucas v. Milwaukee & S. P. Ry.*, 33 Wis. 41; *Washburn v. Nashville & C. R. R.*, 3 Head (Tenn.) 638; *Everett v. Oregon, S. L. & U. N. Ry.*, 9 Utah 340, 34 Pac. Rep. 289.

² *Stalcup v. Louisville, N. A. & C. Ry.*, 16 Ind. App. 584, 45 N. E. Rep. 802; *Powers v. Boston & M. R. R.*, 153 Mass. 188, 26 N. E. Rep. 446; *Eaton v. Delaware, L. & W. R. R.*, 57 N. Y. 382; *Louisville & N. R. R. v. Hailey*, 94 Tenn. 383, 29 S. W. Rep. 367; *Houston & T. C. R. R. v. Moore*, 49 Tex. 31; *Gulf, C. & S. F. Ry. v. Campbell*, 76 Tex. 174, 13 S. W. Rep. 19.

³ *Files v. Boston & A. R. R.*, 149 Mass. 204, 21 N. E. Rep. 311; *Stringer v. Missouri Pac. Ry.*, 96 Mo. 299; *Rucker v. Missouri Pac. R. R.*, 61 Tex. 499.

⁴ *Hoar v. Maine Central R. R.*, 70 Me. 65.

⁵ *Higgins v. Cherokee R. R.*, 73 Ga. 149 (*semble*); *Snyder v. Natchez R. R. & T. R. R.*, 42 La. Ann. 302, 7 So. Rep. 582.

⁶ *McCauley v. Tennessee, C. I. & R. R. Co.*, 93 Ala. 356, 9 So. 611; *Graham v. Toronto, G. & B. Ry.*, 23 U. C. C. P. 514.

⁷ *Lackawanna & B. R. R. v. Chenowith*, 52 Pa. 382.

Stealing a Ride.

One who steals a ride upon a vehicle of the carrier, that is, conceals himself, intending to evade fare, is not to be regarded as a passenger;¹ and the same thing is true where a person gets on board the carrier's vehicle, refuses either to pay fare or to leave the vehicle, and succeeds in staying on the vehicle by force. In a case of this sort a person entered a stagecoach with a revolver and compelled the driver to allow him to ride without payment of fare. The coach broke down, and he was injured and sued for damages; but it was held that he was not a passenger and could not recover damages.²

So where a person is riding on a train, having used or intended to use a ticket which he knows he has no right to use, and concealing or intending to conceal that fact from the conductor, he is not to be regarded as a passenger, even if the conductor permits him to ride.³ The consent of the conductor to accept the ticket is not material if the consent was obtained by fraud; though probably if knowing the facts the conductor allowed the substitution, the person so allowed to ride would be a passenger;⁴ and clearly, if the carrier habitually permitted such substitution, in spite of the exact terms of the ticket, the person using it in accordance with the custom would be a passenger.⁵

A child traveling with an older person who refuses to pay his fare is not entitled to be regarded as a passenger.⁶

This doctrine seems unassailable, though the English Court of Queen's Bench refused to say that the fraud of the older person would prevent the child becoming a passenger.⁷ And where the older person *bona fide* fails to pay for the child, though under

¹ State v. Baltimore & O. R. R., 24 Md. 84; Huehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. Rep. 315; Chicago B. & Q. R. R. v. Mehlsack, 131 Ill. 61, 22 N. E. Rep. 812; Planz v. Boston & A. R. R., 157 Mass. 377, 32 N. E. Rep. 356; Barry v. Union Ry. (N. Y. App. Div.), 94 N. Y. Supp. 449.

² Higley v. Gilmer, 3 Mont. 90.

³ Way v. Chicago, R. I. & P. Ry., 64 Ia. 48 (non-transferable mileage-book issued to another); Union Pac. Ry. v. Nichols, 8 Kan. 505 (fraudulent impersonation of express messenger); Toledo W. & W. R. R. v. Beggs, 85 Ill. 80 (non-transferable free pass issued to another).

⁴ Way v. Chicago, R. I. & P. Ry., *supra*.

⁵ Great Northern Ry. v. Harrison, 10 Exch. Rep. 376.

⁶ Beckwith v. Cheshire R. R., 143 Mass. 68, 8 N. E. Rep. 875.

⁷ Blackburn, J., in Austin v. Great Western Ry., L. R. 2 Q. B. 442, 446.

the rules of the company a fare is due from a child of that age, the child has been held a passenger.¹

It sometimes happens that a person enters a carrier's vehicle prepared to pay fare if it is demanded, but hoping to escape the notice of the conductor and so avoid paying fare. It is hard to see how this form of fraud differs from that of a person riding on a non-transferable ticket issued to another; and the better view would seem to be that such a person is not a passenger until by paying his fare he is received as such by express consent of the conductor. Before being so expressly received, he can make himself out a passenger only by bringing himself within the terms of the invitation; and no invitation is extended to persons to enter the vehicle and try to "beat" the company. In a New York case, however, this view was not taken. It appeared in that case that the plaintiff had paid her fare, and taken passage on a ferryboat across a river, but on arriving at the other side, instead of leaving the boat, had crossed back again, without the payment of an additional fare. It was assumed that the fare paid on entering the boat covered only a single passage. It was held that since she did not attempt to conceal herself on the boat she was a passenger on the return trip. The court said:

"She remained on the boat; did not go ashore, so as to pass through the gate at the landing. The employes of the company saw her there, and it was their business to demand her fare, if they intended to charge her. Their doing so would not render her liable to be held guilty of negligence, or of being carried gratuitously, so as not to render the company liable for damages arising through negligence on their part."²

However that may be, it is clear that if the traveler in such a case takes any step to conceal himself from the conductor he will not become a passenger. In one case of this sort it appeared that two persons were shipping horses over a railroad, and that by the laws of the road, as they knew, only one person was entitled to be carried free with the horses. A drover's ticket was issued to one of them. The other also entered the stock car with the horses, having no ticket, but afterwards asserted that he was ready to pay his fare upon demand. The conductor would not ordinarily come to a stock car to collect fares from passengers. The court held, and it would seem rightly, that the person riding without a ticket

¹ *Austin v. Great Western Ry.*, L. R. 2 Q. B. 442.

² *Barnard, J.*, in *Doran v. East River Ferry Co.*, 3 Lans. (N. Y.) 105.

was not a passenger.¹ The general question whether a person riding without a ticket but expressing his readiness to pay fare if called upon is a passenger or not is a question of fact.²

Guest of a Servant of the Carrier.

One who is riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant, without paying fare, is not a passenger; his relation is with the servant, not with the carrier.³

Thus, where a yardmaster out of hours took an engine and car without permission of the defendant company, and invited persons to ride free in the car to a meeting, over a portion of the road not used for passenger trains, he was held not to have even apparent authority to act for the company, and the persons so riding were not passengers.⁴ And where a party of children were invited by a servant of the carrier to ride on a train which was being shifted through the yard, they were not passengers.⁵

In a few cases, however, it has been held that children riding on a vehicle by invitation of a servant of the company are entitled to be regarded as passengers. Thus, where the driver of a street car invited children to ride on the front platform, they were held to be passengers;⁶ and where a conductor invited a boy to ride in a freight train (on which passengers were sometimes carried) the boy was held to be a passenger.⁷ But these cases can hardly be supported on this point. The children concerned were clearly

¹ Gardner v. New Haven & N. Co., 51 Conn. 143.

² Ramm v. Minneapolis & S. L. R. R., 94 Ia. 296, 62 N. W. 751 (passenger on freight train, intending to pay fare, climbs on flat car because platform of caboose is crowded).

³ Waterbury v. New York, C. & H. R. R. R., 17 Fed. Rep. 671 (riding on engine by consent of engineer); Atchison, T. & S. F. R. R. v. Headland, 18 Col. 477, 33 Pac. Rep. 185 (conductor induced to let plaintiff ride free on freight train); Toledo, W. & W. Ry. v. Brooks, 81 Ill. 245 (conductor induced to let plaintiff ride free on passenger train); Chicago & A. R. R. v. Michie, 83 Ill. 427 (riding on engine by consent of engineer); McVeety v. St. Paul, M. & M. Ry., 45 Minn. 268, 47 N. W. Rep. 809 (riding free on freight train); Woolsey v. Chicago, B. & Q. R. R., 39 Neb. 798, 58 N. W. Rep. 444 (riding on engine by consent of fireman, to shovel coal); Robertson v. New York & E. R. R., 22 Barb. (N. Y.) 91 (riding on engine by consent of engineer).

⁴ Chicago, S. P. M. & O. Ry. v. Bryant, 65 Fed. Rep. 969.

⁵ Reary v. Louisville, N. O. & T. Ry., 40 La. Ann. 32, 3 So. Rep. 390.

⁶ Wilton v. Middlesex R. R., 107 Mass. 108; Muehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. Rep. 315; Buck v. Power Co., 108 Mo. 185, 18 S. W. Rep. 1090.

⁷ St. Joseph & W. R. R. v. Wheeler, 35 Kan. 185, 10 Pac. Rep. 461; Sherman v. Hannibal & S. J. R. R., 72 Mo. 62 (*semble*); Whitehead v. St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. Rep. 751.

guests of the servant, not of the carrier. However far the apparent authority of a conductor may be held to extend, it cannot cover an invitation to ride free; free carriage is not the carrier's business.

If one riding free by invitation of a servant is not a passenger, *a fortiori* one who by misrepresentation induces the servant to let him ride free is not a passenger;¹ and still more clearly one who bribes the servant by a small fee to let him ride without paying the regular fare is not a passenger.²

It will be noticed that the cases follow closely the principle laid down at the beginning of this article; and that to prove himself a passenger one must prove either actual acceptance as such by a servant having authority, or else an exact compliance with the terms of an invitation extended by the carrier to the public.

Joseph H. Beale, Jr.

CAMBRIDGE, MASS.

¹ *Condran v. Chicago, M. & S. P. Ry.*, 67 Fed. Rep. 522.

² *McNamara v. Great Northern Ry.*, 61 Minn. 296, 63 N. W. Rep. 726; *Janny v. Great Northern Ry.*, 63 Minn. 380, 65 N. W. Rep. 450; *Brevig v. Chicago, S. P. M. & O. Ry.*, 64 Minn. 168, 66 N. W. Rep. 401.

THE CONVEYANCE OF LANDS BY ONE WHOSE LANDS ARE IN THE ADVERSE POSSESSION OF ANOTHER.

WHERE a person, whose land is in the adverse possession of one claiming a freehold, attempts to convey the land without first terminating the adverse holding, there is much diversity of authority as to the result. A statement of the various rules and an historical review of the reasons for them is here attempted.

English Law Prior to the Pretended Title Act of 1540.

The basic idea of the old system of land laws was seisin,¹ at least after the word seisin ceased to cover all kinds of possession,² and became only the possession of one who, by right or by wrong, had a freehold estate in the land. We must, therefore, at the outset get a clear idea of seisin and also of disseisin and the other forms of adverse possession known to the old law.

Seisin was a feudal word. He who had seisin by virtue thereof performed the feudal duties and enjoyed the rights of tenure that went with estates thought worthy to be held by a freeman, *i. e.*, those that went with estates of freehold.³ "The man who is seised is the man who is sitting on land";⁴ he is the man who, in the eyes of the feudal law, was the representative of the land for the time being, and as such owed fealty and performed homage. Lord Mansfield defines seisin, substantially, as that which was handed over by the ceremony of livery of seisin, which was the ceremony of feudal investiture;⁵ but that definition is not helpful except to show that, because livery of seisin was necessary only where freehold estates were created or transferred, seisin is a word used properly only where freehold estates are involved. A much better

¹ "In the history of our law there is no idea more cardinal than that of seisin." Pollock and Maitland, *Hist. of Eng. Law* ii. 29.

² That early in the law seisin meant only possession, see Pollock and Maitland ii. 31 ff.; Williams, *Real Property*, 17th ed., 35.

³ *Day v. Solomon*, 40 Ga. 32, 33-4.

⁴ Pollock and Maitland ii. 29.

⁵ "Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass." *Taylor v. Horde*, 1 Burr. 60, 107.

definition is the following: "It is only a possession, coupled with an actual claim of a freehold, or possession under such circumstances that the law presumes such a claim, which amounts to a seisin. . . . Seisin, then, may be defined to be possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold."¹ So, too, the possession itself may be actual or implied by law. Where the possession is actual we have seisin *in deed* or *in fact*; where it is implied by law, we have a right of immediate possession of land treated as possession, so as to give seisin *in law*. Seisin in law was thus a fictitious or constructive seisin which the law recognized in an heir or devisee the very moment the ancestor or testator died, or in the remainder man or reversioner on the death of the life tenant in possession.² While seisin in law was good for some purposes, it was so slight a thing that when the heir, for instance, entered and thereby obtained seisin in fact, the latter seisin forthwith merged and put an end to the seisin in law, *i. e.*, the right of immediate possession of the freehold was swallowed up in the actual rightful possession. The fundamental idea about seisin was that while there were two kinds, there could be at a given moment for a given piece of property only one seisin,³ and only one kind.

Disseisin was the wrongful taking away from the real owner of his actual seisin. "Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold and performed the acts of the freeholder and appeared in that character in the lords' court;"⁴ or, as Lord Mansfield put it: "Disseisin, therefore, must mean some way or other turning the tenant out of his tenure and usurping his place and feudal relation."⁵ How this was accomplished originally, unless the lord conspired with the disseisor, we do not know.⁶ It is sufficient for

¹ Towle v. Ayer, 8 N. H. 57, 58-9.

² In Bracton's time there could be a vacant seisin. The fiction of seisin in law came later. Pollock and Maitland ii. 60.

³ 1 Wash., Real Property, 6th ed., 54, § 95.

⁴ Lord Ellenborough in William v. Thomas, 12 East 141, 155. See 4 Kent Com. 482.

⁵ Taylor v. Horde, *supra*, at p. 107.

⁶ "From what we know of the feudal law it does not appear how a disseisin could be effected without the consent or connivance of the lord; yet we find the relationship of lord and tenant remained after the disseisin. Thus, after the disseisin the lord might release the rent and services to the disseisee; might avow upon him; and if he died, his heir within age, the lord was entitled to the wardship of the heir." Hargrave and Butler's note to Litt. § 448.

our purpose that disseisin was early possible, and that every wrongful taking of seisin from the real owner was not necessarily a disseisin. That only was disseisin, where some one entered upon and ousted one who had taken actual possession under claim of freehold.¹ Certainly this was true of actual disseisin, though there was a disseisin by election, where persons, to avail themselves of the remedy by assize, frequently were allowed to suppose or admit themselves to be disseised when they were not.² Whatever may be true of the law of to-day, there was in the early common law a clear distinction between disseisin and other forms of adverse possession; for unless actual seisin was interfered with, or could be regarded as interfered with for the purposes of the action, there was no disseisin, though there might perhaps be an abatement or some other form of adverse possession.

From disseisin we pass to the other forms of adverse possession. Putting an end to seisin in law by wrongfully taking actual seisin constituted the kinds of adverse possession known as abatement and intrusion, while there were also other kinds of adverse possession known as discontinuance and deforcement.

A stranger's unlawful entry under claim of freehold and retention of possession of land which had descended to an heir or passed to a devisee who had not yet entered was known as abatement. He did not disseise the heir or the devisee, because they did not have actual seisin, but he entered upon the vacant possession and abated, *i. e.*, overthrew, the freehold of the heir or devisee,³ who then had a right of entry as well as of action.⁴

Intrusion was of two kinds: the first was the same as abatement, except that it concerned the remainder man or reversioner after

¹ 3 Bl. Com. 169; Co. Litt. 153 b.; Litt. § 279; 4 Kent Com. 482.

² Curiously enough, Lord Mansfield extended the meaning of disseisin by election to cover the case of an owner refusing to consider himself disseised, where, by the early law, he actually was disseised. "In *Taylor v. Horde*, 1 Burrow 60, the principles of the common law were ably shown by Mr. Knowler to be, that a wrongful possession by a stranger and feoffment by him passed to the feoffee an actual immediate estate of freehold, with all its rights and incidents, defeasible only by the lawful owner, whose right of entry, however, was taken away by a descent cast on the heir of the feoffee. Lord Mansfield, however, held that mere acts of intrusion or trespass, followed by a feoffment, could not thus turn the lawful owner into a disseisee, unless he should elect to consider himself disseised, and this doctrine has been since generally adopted in the English cases (*Jerrett v. Weare*, 3 Price 575; *Goodright v. Forrester*, 1 Taunt. 578; *Doe v. Lynes*, 3 B. & C. 388), notwithstanding the earnest stand made against it by Mr. Preston and Mr. Butler. Preston on Abstracts 279; Butler's note to Co. Litt. 330 b." Rawle, Covenants for Title, 5th ed., § 38, note.

³ 3 Bl. Com. 167-8.

⁴ 3 Bl. Com. 175.

the death of the life tenant in possession; and the second was the same as disseisin except that the would-be disseisor, or the ousted party, was the king. In the first there could be no disseisin, because the remainder man or reversioner did not have actual seisin. In the second there could be no disseisin, because the king could not take the subject's seisin, for that was held of the king and the king could hold of no one, while a subject could not take the king's seisin, for a subject must hold of the king, whereas the king's holding was allodial.¹ In intrusion, as in abatement, the dispossessed party had a right of entry as well as of action.²

A feoffment by a tenant in tail in fee or in tail, or for the life of the feoffee was a discontinuance. So, too, prior to the Statute 32 Henry VIII, c. 28, the alienation of a husband seised *jure uxoris* worked a discontinuance of the wife's estate. Moreover, "a discontinuance is the effect of a disseisin, when, on certain events, the person disseised has lost his right of entry upon the disseisor and can only recover by action."³ Where the tenant in tail worked a discontinuance, that meant that on his death neither the heir in tail, nor those in remainder or reversion, could enter, but instead they had only a right of action, requiring strict proof.⁴

Deforcement, while broad enough to include disseisin, abatement, intrusion and discontinuance, had also a narrower meaning when discriminated from them: "Such a detainer of the freehold from him that hath the right of property but never had any possession under that right, as falls within none of the injuries which we have before explained."⁵ It covered, for instance, the case where the entry was originally lawful but the detainer has become unlawful, *i. e.*, where a lessee for years, after the expiration of his term, refuses to deliver up the possession.⁶ In deforcement, as in

¹ Taylor v. Horde, *supra*, at p. 109. Webb v. Marsh, 22 Can. Supreme Ct. 437, 441.

² 3 Bl. Com. 175.

³ Hargrave & Butler's note to Litt. § 448.

⁴ 2 Bl. Com. 198; 3 Bl. Com. 171-2.

⁵ 3 Bl. Com. 172-3.

⁶ 3 Bl. Com. 173. Later, with reference to fines and the statutes of limitation, adverse possession was discriminated in English law from disseisin without being called deforcement. For instance, it was held that a tenant at sufferance could not be a disseisor since his entry was not wrongful. Doe v. Perkins, 3 M. & S. 271. See Doe d. Souter v. Hull, 2 D. & R. 38. Yet, where it was wrongful for him to stay in possession he could acquire title by adverse possession under the statute of limitations, since there the question was wholly one of whether the possession was inconsistent with a freehold in the real owner. Doe v. Gregory, 2 Ad. & E. 14. See Cholmondeley v. Clinton, 2 J. & W. 1, 164. So a lease by a stranger and entry by the lessee was not

discontinuance, there was no right of entry, but only a right of action.¹

The terms having been defined, our first question is: Could the disseisee of lands convey them during the disseisin? Because at a given moment only one seisin was possible for a given piece of land, and because to make a valid conveyance of a freehold at common law it was necessary for the feoffor to hand this seisin over to his feoffee by the ceremony known as livery of seisin,² this question of whether a disseisee could convey during the disseisin necessarily has very narrow limits. Indeed the limits are so narrow that the general impression is that the question is not debatable.

So far as the ceremony of livery of seisin *in fact* is concerned, *i. e.*, livery of seisin where the parties actually went on the ground and there made the conveyance and performed the ceremony, the question certainly is not debatable; for the entry by the disseisee for the purpose of the conveyance restored his seisin and so took away from him the character of a disseisee.³ Where there were several in possession only the one who had the legal title had the seisin;⁴ and while livery in deed required the delivery to the feoffee of what was known as a vacant possession, that seemingly was complied with where all persons who had any "lawful" estate or possession in the land conveyed joined in or consented to the livery or else were absent from the premises.⁵

a disseisin in fact, without an entry by force or an avowed intention to disseise. *Jerrett v. Weare*, 3 Price 575. But in 1833 by the Real Property Act of 3 and 4 Will. IV, c. 27 (amended in 1874 by 37 and 38 Vict. c. 57) the distinction between adverse possession and disseisin was ended in England. *Nepean v. Doe d. Knight*, 2 M. & W. 894; see *Culley v. Taylerson*, 3 Per. & Dav. 539. Under that act one gets title by limitation, not by virtue of adverse possession, but in general because certain fixed times have elapsed since the former owner acquired rights of entry, distress or action.

¹ 3 Bl. Com. 175.

² Livery of seisin was the formal delivery of possession necessary at common law where one, who by right or by wrong, had a freehold estate, conveyed to one who was to take a freehold estate. It should be discriminated from the feoffment of which it was a part. A feoffment included both (1) a livery of seisin, *i. e.*, an outward symbolic transfer of that possession which goes with a freehold, and (2) a statement in the form required by law of the precise freehold estate granted. The livery transferred the possession; the statement of the estate granted fixed the rightful limits of that possession, or, in other words, defined the feoffee's title. Williams, *Real Property*, 17th ed., 139.

³ Co. Litt. 48 b, 49 a; see *Knox v. Jenks*, 7 Mass. 488.

⁴ Litt. § 701; see *Barr v. Gratz*, 4 Wheat. (U. S.) 213, 223; 4 Kent Com. 482.

⁵ Shep. Touch. 213. It was because of the need of giving a vacant possession that

But what about livery *in law*? There the feoffment was made not on the land, but in sight of it. Where a feoffment with such livery was made it was ineffective unless the feoffee actually entered during the life of the feoffor,¹ or unless, not daring to enter for fear of his life or bodily harm, he made yearly his "continuall claime"² in due form of law as near the land as possible;³ but if the feoffee entered in the lifetime of the feoffor, or in a proper case made due continual claim, it would seem, on principle, that he would get title even if the feoffor was disseised at the time of the feoffment.⁴ If the feoffee actually entered on the disseisor he would wrest the seisin from the disseisor and have it as effectually as if the disseisee had entered before the feoffment,⁵ while, if the feoffee made duly his continual claim he would accomplish the same result, because such continual claim constituted an entry in law, "which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong."⁶ Neither Littleton nor Coke appears to discuss this case of a disseisee conveying by livery in law; but that is probably because they never knew such a case to arise.⁷ Such a conveyance

"if a man entered and made a feoffment, the owner being upon the land, the feoffment was void." 1 Wash., Real Property, 5th ed., 35, § 78.

¹ "The death of either party [before entry] I agree would make it [livery in the view] void; for if the feoffor dies his heir is in by descent; if the feoffee dies and his heir enter, he must be a purchaser, which he cannot be by the feoffment not being made unto him, and by descent he cannot claim because his ancestor not entering, he was never seised." Poll. 48.

² Continual claim was abolished in England by the Statute 3 and 4 Will. IV, c. 27, § 11.

³ 2 Bl. Com. 316.

⁴ Where Sheppard's Touchstone, speaking "Of a Grant" said: "And therefore if a man have disseised me of my land, or taken away my goods, I may not grant over this land or these goods until I have seisin of them again" (Shep. Touch. 240), the language clearly had no application to feoffments, but only to grants. Besides, coming after Coke on Littleton, the author of Sheppard's Touchstone is subject to the comments on Coke made in note 7 *infra*.

⁵ "Where a man that hath title to enter, comes into possession, the law doth execute the estate to him." Argument of Pollexfen in *Parsons v. Perns*, 1 Mod. 91.

⁶ As Littleton expresses it, where one entitled to make a continual claim makes it, "Presently by such claime hee hath a possession and seisin in the lands as well as if hee had entered in deed, although hee never had possession or seisin of the same lands or tenements before the said claime." Litt. § 419. See also 3 Bl. Com. 175.

⁷ As late as Trinity Term, 28 Hen. VIII—a number of years after the death of Littleton—Shelley, J., said: "And no man ever saw a livery by the view unless for a cause material to suppose in enforcing the matter: as if to say that land was on the other side of the Thames to which the feoffor could not come for the water; or at the door of a church, when a man endows his wife of land within the view, it is well

was clearly possible under the principles which they laid down,¹ and a strong argument in favor of its legality is found in the fact that while livery in deed required, as we have seen, the delivery of a vacant possession, the absence from the land of those having estates therein, or their consent if on the land, was not necessary in the case of livery in law.² It would therefore seem as if at common law, despite the general assumption to the contrary, a disseisee by a feoffment made with livery in law could convey during the disseisin;³ but such livery was effective, if at all, only where the disseisee still had his right of entry as well as his right of action. Where the disseisee had only a right of action left, he had nothing to convey, for the common law doctrine against maintenance made the right of action non-assignable, but where he had his right of entry, that was sufficient interest in the land to enable him, by livery in law, to create a new right of entry in his feoffee,⁴ even though the feoffor's own right of entry was not transferable.⁵ Since

enough, for that is made in consideration of dower." Dyer 18 b. (On the dower point see 38 Edw. III, Pl. 11, stated in Poll. 53.) The very early English conveyancers were too careful to experiment.

In Littleton's time, therefore, the situation discussed in the text had not arisen, and Coke's subsequent failure to consider it is due to the fact that as he was not born until after the passage of the Pretended Title Act, he had no occasion to consider anything but the effect of that act.

¹ That is, of course, apart from the Pretended Title Act. Coke saw that a conveyance by a disseisee was prohibited by that act. Co. Litt. 369 a.

² 5 Encyc. of Laws of Engl., 330.

³ A disseisee who, by continual claim, had recovered seisin from one who still continued in adverse possession, could undoubtedly convey by feoffment with livery in law. That sort of case, and cases where a disseisor of short occupancy, and a disseisee of short reoccupancy, conveyed to people powerful enough to get the better of their opponents gave rise to the Pretended Title Act.

⁴ This new right of entry was really a power of attorney to enter. That was why it terminated on the feoffor's death, and moreover was why livery in law must be made by the party himself, though livery in deed could be given by attorney. Of course before a man could authorize another to enter, he must himself have at least a right of entry; but if he had that, then the power of attorney to enter which he gave to his feoffee by livery in law was irrevocable except by death. See *Parsons v. Perns*, 1 Mod. 91, where the marriage of the feoffor to the feoffee after a feoffment within view, and before entry, did not revoke the feoffee's power to enter under the feoffment.

⁵ A disseisee's own right of entry seems to have been untransferable, because, in its nature, too slight a thing to survive transfer. Coke, to be sure, gives the reason for its non-assignability to be maintenance, but that does not explain it satisfactorily. Maintenance will explain the non-assignability of the disseisee's right of action, but nothing short of inherent incapacity for transfer, unless authorized by legislation, will explain the non-assignability of his right of entry. By statute in England, and many states of the United States, rights of entry have at last been infused with enough

at best, therefore, a disseisee could alienate by livery in law, only where he still had a right of entry, he could do so only in his lifetime and that of the disseisor, and not then if the disseisor enfeoffed another, and that other continued in possession a year and a day.¹

And now a word about the other forms of adverse possession. Only abatement and intrusion were like disseisin in being terminable by entry, and only they, therefore, permitted of feoffment by livery in law. In discontinuance and deforcement there was only a right of action in the ousted party, to assign which would be maintenance. In abatement and intrusion, as in disseisin, the right of entry might be lost by the death of the abator or intruder,² and presumably by the feoffment of the abator or intruder and possession by the feoffee for a year and a day.

As the Statute of Uses was passed in 1535, five years before the Pretended Title Act, it is necessary to say a word here about conveyances operating under that statute. While a feoffment could have, and often did have, a tortious operation, all conveyances under the Statute of Uses were innocent, *i. e.*, like common law grants, such conveyances passed only that which the grantor had.³ As the Statute of Uses operated only to transfer possession from one man to another, it could not give it to the second man unless the first man had it. Conveyances under the Statute of Uses could be effective, therefore, only where the covenantor or bargainor had actual possession, or his right to possession was undisputed. A feoffment to uses, made with livery in law, would doubtless pass the seisin of a disseisee if the feoffee actually entered or made due continual claim, but until the feoffee got the seisin under the feoffment, the Statute of Uses could not operate to give the seisin to the *cestui que use*. So a covenant to stand seised could

vigor and capacity to be transferred effectually by will and by conveyance *inter vivos*.

¹ "If the disseisor died after one year's non-claim, the descent to his heir gave the heir the right of possession and took away the true owner's entry. The Statute 32 Hen. VIII, c. 33, requires five years' non-claim. The feoffee of a disseisor acquired title of possession . . . by one year's non-claim. The descent to his heir remains privileged as it was at common law; for the 32 Hen. VIII, c. 33, extends not to any feoffee of the disseisor immediate or mediate. Co. Litt. 256 a. The feoffee of a disseisor was favored; because he came innocently into the tenure by a solemn and public investiture with the lord's concurrence."—Lord Mansfield in *Taylor d. Atkyns v. Horde*, *supra*, at p. 108.

² 3 Bl. Com. 176. See note 5, p. 273, *supra*.

³ *Jackson v. Brinckerhoff*, 3 Johns. Cas. (N. Y.) 101, 104.

have effect as a conveyance under the statute only where the covenantor was seised. So, under a bargain and sale deed, or under a bargain and sale lease (the kind used in conveyance by lease and release), possession could pass only where the bargainor had it. By conveyances under the Statute of Uses, therefore, the rightful owner could not pass title to his grantee while some third person wrongfully held the seisin.¹

Prior to the Pretended Title Act, therefore, there could be no conveyance at common law of lands in the adverse possession of another, except where the true owner either (1) entered and made a feoffment on the land with livery in fact, or (2), in the case of abatement, intrusion and disseisin made a feoffment with livery in law before the death of the abator, intruder or disseisor (or before the expiration of a year and a day after feoffment by such a one), and thereafter during his life his feoffee either actually, or by making continual claim, entered; and no conveyance operating under the Statute of Uses could be effective unless the covenantor or bargainor had possession, or the feoffee to uses got seisin.

English Law After the Pretended Title Act of 1540.

In 1540 Parliament passed the Pretended Title Act. That act provided that no person should bargain, sell or obtain "any pretended rights or titles," or take, promise, grant or covenant to have any right, title or interest in real property, unless the persons bargaining, selling, etc., their ancestors, or those under whom they claimed, should have been in possession of the real property, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the transaction, upon penalty that the seller, etc., and the buyer, etc., with knowledge of the lack of possession should each forfeit the whole value of the property, one-half to go to the king and one-half to the informant.²

¹ See Rawle; Covenants for Title, 5th ed., 63, and see the following cases under the Pretended Title Act: *Doe d. Dunn v. McLean*, 1 U. C. Q. B. 151; *Doe d. Bouter v. Savage*, 5 U. C. Q. B. 223; *Doe d. Simpson v. Molloy*, 6 U. C. Q. B. 302; *Hopkins v. Ward*, 6 Munf. (Va.) 38; See *v. Grenlee*, 6 Munf. (Va.) 303.

² 32 Hen. VIII, c. 9, § 2. "It will be observed that the first provision against buying or selling speaks of 'pretenced' rights or titles, while the second provision against taking any promise or covenant omits the word 'pretenced.' But in our opinion both branches of the section refer to the same class of rights and titles. . . . The question, therefore, is, what is a 'pretended' right or title within the meaning of the statute. This term in our opinion applies either to a title for which in fact there is no foundation, or to a right or title which, though not fictitious, was not, as the law stood at the date of this enactment, capable of being conveyed. . . . All dealings with rights of

This statute ended all question as to the right of a disseisee to convey. Whatever may have been true before the statute, no one after it could convey during another's adverse possession so as to affect that other.¹

The Pretended Title Act is often spoken of as an affirmation of the common law,² but it certainly went farther than the earlier law. By the earlier law a disseisor did not have to be in possession a year before making a conveyance, but after this statute he had to do so. By the earlier law a disseisee did not have to wait a year after he re-entered before conveying, yet by a literal construction of this statute he was required to do just that,³ though a more liberal construction was advocated.⁴ All that can possibly be meant by calling the act an affirmation of the common law is that maintenance was interdicted by the common law, and this statute was aimed at one form of maintenance. The mischief at which the act was aimed "was that individuals possessed of rights, real or pretended, transferred them to persons more able, or more disposed, than themselves to litigate them. This was considered to be a great evil."⁵ Despite the opinion of Montague, C. J., to the contrary,⁶ this statute really altered the common law, for it made bad some conveyances which at common law were good.

entry, except by release to the person in possession, were, therefore, previously to the statute of 8 and 9 Vict., dealings with 'pretenced' rights and titles within the meaning of the act of Hen. 8."—Cotton, L. J., in *Jenkins v. Jones*, 9 Q. B. D. 128, 134-5.

By sec. 4 of the act, one in possession for the year could purchase pretended titles or get them in any reasonable ways.

¹ Co. Litt. 369 a; *Underwood v. Lord Courtoun*, 2 Sch. & Lef. 65.

² Montague, C. J., in *Partridge v. Strange*, 1 Plowd. 77; *Doe d. Williams v. Evans*, 1 C. B. 717; *Jenkins v. Jones*, *supra*, at p. 135. See *Hathorne v. Haines*, 1 Greenl. (Me.) 238, 247; *Bishop of Toronto v. Cantwell*, 12 U. C. C. P. 607, 610.

³ *Hawkins' Pleas of the Crown*, c. 86, § 16. But see Co. Litt. 369 a, *semble contra*, though Coke there says that if a disseisor die and the disseisee disseises the heir of the disseisor, the disseisee cannot convey for a year. Coke is supposed to be *contra* to Hawkins, because Coke says that if the disseisee release to the disseisor the latter may convey without waiting a year, Coke giving as a reason, that nobody is prejudiced by this action of the disseisor. The two can be reconciled by giving the better reason that by accepting a release from the disseisee the disseisor claims under him, and hence the disseisor and those under whom he claims have been in possession the year required by the statute.

⁴ *Whitesides v. Martin*, 7 Yerg. (Tenn.) 383, 397; *Kincaid v. Meadows*, 3 Head (Tenn.) 188, 192, and see note 3, *supra*.

⁵ Maule, J., in *Doe d. Williams v. Evans*, *supra*, at p. 726. So *Slywright & Page's Case*, 1 Leon. 166, 167.

⁶ See note 2, *supra*.

In Mr. Rawle's excellent book on Covenants for Title, it is stated that under the Pretended Title Act and the English decisions about it "the offense of maintenance consisted not so much in taking a conveyance of the whole or part of a thing not vested in the party by whom it was made, as in taking it in consideration of assisting or maintaining a suit for its recovery," and that it is "well settled" in England that where the transfer is not made for the purpose of assisting or maintaining a suit the "mere fact of an adverse possession will not invalidate the conveyance."¹ But except as applied to the situation in England since the statute of 8 and 9 Vict., c. 106, sec. 6, making rights of entry alienable, the authorities do not bear out the statements. Where the grantor was out of possession, or if in possession he, or those under whom he claimed, had not been in for a year before the conveyance, the conveyance was void under the Statute 32 Hen. VIII, whether it was in fact made for maintenance or not.² This was clearly so where the grantee knew of the grantor's lack of possession.³ In other words, the statute established a presumption which could not be rebutted that such a conveyance was made for maintenance; for as has pertinently been said: "The principal mischief contemplated by the act is the maintenance of an action by the purchaser upon the pretended title. How is that mischief to be obviated except by making the conveyance void?"⁴

Under the Pretended Title Act, therefore, a conveyance was void if either the grantor was out of possession at the time, or the grantor, though in possession at the time, had not been in possession himself or by his ancestor, grantor, etc., for one year prior to the conveyance. What is meant by calling the conveyance void is uncertain under the English cases.⁵ It would certainly seem that the conveyance was a nullity as far as the adverse possessor, his heirs and assigns were concerned,⁶ yet as between the dispossessed grantor and his grantee the conveyance undoubtedly was good, for while "there can be no doubt that conveyances of titles are made void [by the Statute 32 Hen. VIII] to the extent

¹ Rawle's Covenants for Title, 5th ed. § 48.

² Doe d. Williams v. Evans, *supra*. See Smith v. Hall, 25 U. C. Q. B. 554, 556.

³ Slywright and Page's Cases, Golds. 101; 1 Leon. 166. See Kennedy v. Lyall, 15 Q. B. D. 491, 495-6.

⁴ Maule, J., in Doe d. Williams v. Evans, *supra*, at p. 721.

⁵ Aubrey v. Smith, 7 U. C. Q. B. 213, 215 (1850). What cases we have are mainly concerned with forfeitures under the act.

⁶ Doe d. Williams v. Evans, *supra*.

that is necessary to prevent the mischief which the act intended to remedy,"¹ that mischief was simply the maintenance of an action by the grantee against the adverse possessor, and was fully defeated by holding the conveyance void as to the adverse possessor. Under the earlier Act of 1 Richard II, c. 9, by which it was provided that feoffments made by disseisors to lords and other great men, to have maintenance should "be holden for none and of no value," it was held: "That feoffments of this kind are only void in respect to the disseisees, but that they are effectual between the feoffor and feoffee."² Such undoubtedly was also true of conveyances forbidden by the Pretended Title Act, but it is only in the American cases that the problem is worked out.

The Pretended Title Act, if not wholly repealed, has been robbed in England of most of its efficacy. In 1845 the Statute 8 and 9 Vict., c. 106, sec. 6, made rights of entry other than those for condition broken alienable by deed; and while the Statute 32 Hen. VIII may still forbid the sale of wholly fictitious titles, and render void the deed of one knowingly taking a wholly fictitious title, the Statute 8 and 9 Vict. makes valid every conveyance by a rightful owner who still has a right of entry, even if his lands are at the time of the conveyance in the adverse possession of another.³

American Authorities.

In the United States the distinction between disseisin and the other forms of adverse possession known to the old law has become obsolete.⁴ We have even ceased to discriminate between disseisin and that adverse possession which will give title under the statute of limitations,⁵ though the old common-law conception of

¹ Maule, J., *Ibid.* at p. 727.

² Hawkins, P. C., c. 86, 418; Year Book, 27 Hen. VIII, p. 23, § b, 1. So Beaumont, J., said in *Upton v. Basset*, Cro. Eliz., 445: "A feoffment upon maintenance or champerty is not void against the feoffor, but against him who hath right."

³ *Jenkins v. Jones*, *supra*; see *Kennedy v. Lyall*, *supra*. So under the Upper Canada Colonial Act of 14 and 15 Vict., c. 7, allowing the sale of rights of entry, it was held that while the sale of a right of entry could no longer be called a pretended right, and the Statute 32 Hen. VIII was therefore so far repealed, the attempted conveyance by a party of a right which in fact he did not have, was still forbidden by the Statute. *Baby v. Watson*, 13 U. C. Q. B. 531.

A disseisee's right of entry was made devisable in England in 1837. Prior to that time such a right of entry was not devisable. 1 Jarman, Wills 49, 50.

⁴ *Smith v. Burtis*, 6 Johns. Cas. (N. Y.) 197, 215.

⁵ *Pickett v. Doe*, 74 Ala. 122, 131; *Unger v. Mooney*, 63 Cal. 586, 590; *Magee v. Magee*, 31 Miss. 138, 151-2. See *Barrett v. Love*, 48 Ia. 103, 111-12.

disseisin finds its expression in those states where possession is not adverse so as to give title, unless the one claiming adversely knows himself to be on another's land.¹ It is still possible, however, to say that a possession is adverse for one purpose and not for another.²

On the question of the right of the real owner of land to convey it while another is in its adverse possession, the states are divided. In several states the Statute 32 Hen. VIII, including the requirement of one year's possession, has been substantially re-enacted,³ though in no state does the one year feature figure much in the decisions.⁴ In several other states, either by statute or by decision, it is declared simply that a conveyance of land during a third person's adverse possession of it is void,⁵ but in far the larger number of states the Statute 32 Hen. VIII, and the common-law doctrine of which it is supposed to be declaratory, are either abolished by statutes authorizing conveyances, notwithstanding there may be an adverse possession of the land,⁶ or else on grounds of public policy

¹ See *Grube v. Wells*, 34 Ia. 148; *Mills v. Penny*, 74 Ia. 172; *Winn v. Abeles*, 35 Kan. 85; *Watrous v. Morrison*, 33 Fla. 261; *Finch v. Ullman*, 105 Mo. 255; *Chance v. Branch*, 58 Tex. 490.

² "It is clear that possession may be adverse under the act of limitations without being adverse under the Champerty Act." *Barret v. Coburn*, 3 Met. (Ky.) 510, 514; *Crary v. Goodman*, 22 N. Y. 170; *Fish v. Fish*, 39 Barb. (N. Y.) 513; *Smith v. Faulkner*, 48 Hun (N. Y.) 186; *Foxcroft v. Barnes*, 29 Me. 128. But in Connecticut this is not so. *Merwin v. Morris*, 71 Conn. 555.

³ 1 N. Y. Rev. Stat. 739, § 147; N. Y. Penal Code, § 130; N. Y. Code Civ. Pro., § 1501; N. Dak. Rev. Codes, § 7002 (Penal Code); Tenn. Code of 1896, §§ 3171-5.

In New York the Revised Statute makes the deed void and the Penal Code makes it a misdemeanor to buy or sell land of which the grantor, or those by whom he claims, have not been in possession for a year; but the Code of Civil Procedure allows the grantee to bring ejectment in the grantor's name.

⁴ It may of course do so at any time.

⁵ Alabama: *Dexter v. Nelson*, 6 Ala. 68; *Pearson v. Adams*, 129 Ala. 157. Connecticut: Gen. Stats. (1888) § 2966. Fla.: *Reyes v. Middleton*, 36 Fla. 99. Ind.: *Steeple v. Downing*, 60 Ind. 478. Ky.: Gen. Stats. c. 11, § 2. N. C.: *Johnson v. Prairie*, 94 N. C. 773. N. Dak.: Rev. Codes (1889), § 7002; *Galbraith v. Payne*, 12 N. Dak. 164. Okla.: Stat. (1893) § 6137.

⁶ Ark.: Stat. (1884) c. 27, § 644. Cal.: Civil Code, § 1047. Colo.: 1 Mills Ann. Stats. § 431. Dist. of Columbia: Code (1902), § 513. Ga.: Code (1882), § 2695. Idaho: Civil Code (1901), § 2293. Ill.: 1 F. & C. Ann. Stat. c. 30, § 4. Iowa: McClain's Rev. Stats. (1888) § 3103. Kan.: Gen. Stats. (1889) § 1115. Me.: Rev. Stats. c. 73, § 1, and c. 104. Mass.: 2 Rev. Laws (1902), c. 127, § 6. Mich.: Rev. Stats. (1846) p. 263, § 71. Minn.: 1 Stats. (1878) c. 40, § 6. Miss.: Rev. Code (1880), § 1187. Mo.: 1 Rev. Stats. (1889) § 2400. Mont.: Comp. Stats. (1887) p. 663, § 268. Neb.: Consol. Stats. (1891) § 4355. Nevada: Gen. Stats. (1885) § 2603. Oregon: 2 Hills Ann. Laws (1887), § 3009. R. I.: Gen. Laws (1896), c. 202, § 11 (authorizing conveyances of rights of entry and of action and so changing the rule of *Burdick v.*

are held by the courts to be obsolete.¹ Most states started with the common-law doctrine. Several states and territories seem to have announced no rule or are uncertain.²

States Following the Common-Law Rule.

In those states where the common-law rule has prevailed, it has been held that so far as the adverse possessor and those in privity with him are concerned, the deed of an ousted owner is a nullity.³ The deed is void no matter how good in fact the grantor's title was,⁴ nor how bad the disseisor's,⁵ and even if the disseisor originally entered by permission of the true owner.⁶ The deed, however, does not work a forfeiture of the grantor's title,⁷ and despite

Burdick, 14 R. I. 574). S. Dak.: Rev. Codes (1903), p. 735, § 996. Utah: Rev. Stats. (1898) § 1980. Vt.: Stats. (1894) § 2240. Va.: Code of Va. (1887) § 2418. W. Va.: Code (1899), c. 71, § 5 (see *Cassedy v. Jackson*, 45 Miss. 397, 407). Wis.: Laws (1865), c. 365. Wyo.: Rev. Stats. (1899) § 2735.

¹ Cal.: (prior to statute) *Lucas v. Pico*, 55 Cal. 126, 128; see *Mathewson v. Fitch*, 22 Cal. 86. Del.: *Doe d. Bright v. Stephens*, 1 Houst. 31. D. C.: (prior to statute) *Matthews v. Heyner*, 2 App. Cas. 349. Ia.: (prior to statute) *Wright v. Meek*, 3 Greene 472; *Foster v. Young*, 35 Ia. 27, 40. Md.: *Schaferman v. O'Brien*, 28 Md. 565. N. H.: *Farrar v. Fessenden*, 39 N. H. 268 (so long as disseisee has a right of entry he can convey). N. J.: *Den v. Geiger*, 9 N. J. Law 225. Ohio: *Hall v. Ashby*, 9 Oh. 96. Penn.: *Stoever v. Lessee of Whitman*, 6 Binn. 416; *Cressin v. Miller*, 2 Watts 272. S. C.: *Sims v. DeGraffenreid*, 4 McCord 253. Tex.: *Carter v. McDermett*, 12 Tex. 545.

The most conspicuous case is South Carolina, where, despite the fact that the Statute 32 Hen. VIII, c. 9, was enumerated by the legislature in the table of statutes in force in the state, the courts said it was "inapplicable under our usages." *Poyas v. Wilkins*, 12 Rich. (S. C.) 420.

² Arizona, Louisiana, New Mexico, Washington. In Washington the deed of a record legal title holder passes to *bona fide* purchasers the full legal and equitable title, free from all claims not of record. 1 Hills Ann. Stats. § 1448. On the civil law which prevails in Louisiana, see *White v. Gay's Executors*, 1 Tex. 384.

³ See 9 Cent. Dig. 2019, § 54. It is useless to multiply cases on this point. One of the latest is *Galbraith v. Payne*, 12 N. Dak. 164.

In Virginia the statute forbidding the conveyance of adversely held land (repealed in 1849) was construed so as to inflict a penalty without avoiding the conveyance (see *Menemeyer v. Wright*, 75 Va. 239, 245-6), but that doctrine was peculiar to Virginia. See note 4, p. 277, *supra*.

The doctrine of the text applies only to deeds. A contract for the sale of lands adversely held is not bad. *Edwards v. Parkhurst*, 21 Vt. 472. Though equity will rescind such a contract at the suit of the buyer. *Williams v. Carter*, 3 Dana (Ky.) 198. And the grantor's heirs may resist successfully a decree for its specific performance. *Bryant's Heirs v. Hill*, 9 Dana (Ky.) 67.

⁴ *Tomb v. Sherwood*, 13 Johns. Cas. (N. Y.) 288.

⁵ *Jackson v. Todd*, 2 Cal. (N. Y.) 183; *Jackson v. Brinton*, 12 Johns. Cas. (N. Y.) 452.

⁶ *Barry v. Adams*, 3 Allen (Mass.) 493.

⁷ *Crowley v. Vaughan*, 11 Bush (Ky.) 517; *Brinley v. Whiting*, 5 Pick. (Mass.) 348, 355, 359; *Jackson v. Brinckerhoff*, 3 Johns. Cas. (N. Y.) 101, 540.

it he may maintain ejectment against the adverse possessor, champerty being no defence to the adverse possessor when the grantor brings ejectment.¹ The grantee, however, cannot bring ejectment in his own name against the adverse possessor,² even though the great weight of authority is, that as between the parties to it the deed is good;³ but in most states he may bring ejectment in the grantor's name, even if the grantor does not know of the action⁴ and recovery will inure to the benefit of the grantee.⁵

¹ Doe v. Roe, 37 Ga. 5; Crowley v. Vaughan, 11 Bush (Ky.) 517; Jackson v. Vredenbergh, 1 Johns. Cas. (N. Y.) 159; Coogler v. Rogers, 25 Fla. 853; Sibley v. Alba, 95 Ala. 191; Green v. Cumberland, etc., Co., 110 Tenn. 35; Brinley v. Whiting, 5 Pick. (Mass.) 348; Stockton v. Williams, 1 Dougl. (Mich.) 546; Nason v. Blaisdell, 17 Vt. 216; Chamberlain v. Taylor, 92 N. Y. 348; Steeple v. Downing, 60 Ind. 478.

But see Luen v. Wilson, 85 Ky. 503, holding that the champertous deed must be rescinded by the grantor in good faith before he can sue.

And see Dever v. Hagerty, 169 N. Y. 481, holding that the grantor cannot maintain ejectment for the grantee against the adverse possessor after having released to the latter.

² Bream v. Cooper, 5 Munf. (Va.) 7; Prestwood v. McGowan, 128 Ala. 267; Crowley v. Vaughan, 11 Bush (Ky.) 517; Coogler v. Rogers, 25 Fla. 853; Lillie v. Hickman, 25 S. W. Rep. 1062 (Ky.); Hoyle v. Logan, 4 Dev. (N. C.) 495; Wentworth v. Abbetts, 78 Wis. 63; Mead v. Fitzpatrick, 74 Conn. 521; Tabb v. Baird, 3 Call (Va.) 475.

The grantee cannot sue in his own name, even though he was ignorant of the adverse possession. Lowber v. Kelley, 17 Abb. Pr. 452.

³ Coogler v. Rogers, 25 Fla. 853; Steeple v. Downing, *supra*; McMahan v. Bowe, 114 Mass. 140; Farnum v. Peterson, 111 Mass. 148; Pearson v. King, 99 Ala. 125; Luen v. Wilson, 85 Ky. 503 (but see Crowley v. Vaughan, 11 Bush (Ky.) 517); Stockton v. Williams, 1 Dougl. (Mich.) 546; Den v. Geiger, 9 N. J. Law 225; Hamilton v. Wright, 37 N. Y. 502; Livingston v. Proseus, 2 Hill (N. Y.) 526; Edwards v. Roys, 18 Vt. 473; Middleton v. Arnold, 13 Gratt. (Va.) 489.

But see *contra* Williams v. Hogan, Meigs (Tenn.) 187; Green v. Cumberland, etc., Co., 110 Tenn. 35; Phelps v. Sage, 2 Day (Conn.) 151; Wentworth v. Abbetts, 78 Wis. 63; Graves v. Leathers, 17 B. Mon. (Ky.) 665; Cardwell v. Spriggs, 7 Dana (Ky.) 36.

⁴ Cleverly v. Whitney, 7 Pick. (Mass.) 35; Coogler v. Rogers, *supra*.

⁵ Brinley v. Whiting, 5 Pick. (Mass.) 348; Coogler v. Rogers, *supra*; Edwards v. Parkhurst, 21 Vt. 472; Galbraith v. Payne, 12 N. Dak. 164; Hamilton v. Wright, 37 N. Y. 502; Sohler v. Coffin, 101 Mass. 179; Wilson v. Nance, 11 Humph. (Tenn.) 188; Den v. Geiger, *supra*; Steeple v. Downing, *supra*; Stockton v. Williams, 1 Dougl. (Mich.) 546; Thompson v. Richards, 19 Ga. 594.

But see *contra* Crowley v. Vaughan, 11 Bush (Ky.) 517; Baley v. Deakins, 5 B. Mon. (Ky.) 159; Key v. Snow, 90 Tenn. 663, *semble*.

In one state the deed is void as to the adverse holder, and yet by statute the grantee may sue the adverse holder in ejectment in the grantee's own name. Johnson v. Prairie, 94 N. C. 773; Osborne v. Anderson, 89 N. C. 261; see Campbell v. Equitable, etc., Co., 94 N. W. Rep. 401 (S. Dak.). And such will probably be held to be the result effected by code provisions allowing actions to be prosecuted in the name of the real party in interest. See Dever v. Hagerty, 169 N. Y. 481; Steeple v. Downing, *supra*.

The grantee must sue in the names of all his grantors. Hasbrouck v. Bunce, 62 N. Y. 475. But a remote grantee of a disseisee cannot even sue in the disseisee's name.

The disseisee's deed is good against all the world, except the disseisor and those in privity with him.¹

It is generally held that the grantor may release to the adverse holder despite his conveyance,² though not after his grantee has commenced an action against the adverse possessor in the grantor's name,³ and that the adverse holder, despite his knowledge of that conveyance, gets good title by the release, since the conveyance is as to him a nullity.⁴ But the heirs of the disseisee are not allowed by release to keep the disseisee's grantee from suing the disseisor in their names.⁵ Where the grantee knew of the adverse possession when he took his deed he cannot sue the grantor for releasing to the adverse holder,⁶ and in the absence of fraud he cannot sue the grantor on the covenants in the latter's deed.⁷ It seems, how-

Smith v. Long, 12 Abb. N. C. 113. The grantor cannot prevent the grantee from suing in the grantor's name. Pearson v. King, 99 Ala. 125.

¹ McMahan v. Bowe, 114 Mass. 140; Galbraith v. Payne, 12 N. Dak. 164; Poor v. Horton, 15 Barb. (N. Y.) 485; University of Vt. v. Joslyn, 21 Vt. 52; Johnson v. Prairie, 94 N. C. 773; King v. Sears, 91 Ga. 577; Fort Jefferson Implement Co. v. Dupoyster, 51 S. W. Rep. 810 (Ky.); Livingston v. Proseus, 2 Hill (N. Y.) 526.

The intimation in a few cases that a disseisee who has conveyed while disseised and thereafter regains possession can convey a good title to a second grantee is disproved by White v. Patton, 24 Pick. (Mass.) 324; Farnum v. Peterson, 111 Mass. 148, 151.

² Everenden v. Beaumont, 7 Mass. 76; Dever v. Hagerty, 169 N. Y. 481; Adams v. Buford, 6 Dana (Ky.) 406; Sessions v. Reynolds, 7 Smedes & M. (Miss.) 130; Williams v. Council, 49 N. C. 206.

³ Edwards v. Parkhurst, 21 Vt. 472; but see Swett v. Poor, 11 Mass. 549.

⁴ Everenden v. Beaumont, *supra*; Swett v. Poor, *supra*; Dever v. Hagerty, *supra*. See also Brinley v. Whiting, 5 Pick. (Mass.) 348; Tabb v. Baird, 3 Call. (Va.) 475; Betsey v. Torrance, 34 Miss. 132.

A release by the disseisee to the disseisor is not forbidden by the Statute 32 Hen. VIII, c. 9, nor by the common law, because such a release is really not a conveyance, but is rather an extinguishment of right; it simply keeps any one from saying that the disseisor's holding is unlawful, or that he has no right to convey. That is why the word "heirs" was not necessary at common law for the disseisee to release a fee to the disseisor. Co. Litt. 9 b. Where the disseisor consents to the conveyance by the disseisee the latter's grantee gets (even against the disseisor) the title the grantor had. Cameron v. Irwin, 5 Hill (N. Y.) 272; McIntire v. Patton, 9 Humph. (Tenn.) 447. So a conveyance by the disseisor to the disseisee's grantee gives the latter a title good against all the world. Ft. Jefferson Imp. Co. v. Dupoister, 51 S. W. Rep. 810 (Ky.).

⁵ Pearson v. King, 99 Ala. 125, but see Swett v. Poor, *supra*.

⁶ Swett v. Poor, *supra*. The grantee's knowledge or ignorance of the adverse possession seems to make no other difference except on the question of the penalties under the Statute 32 Hen. VIII. Ignorance will save the grantee from the penalty. Etheridge v. Cromwell, 8 Wend. (N. Y.) 629. See Sherwood v. Barlow, 19 Conn. 471; Varrell v. Holmes, 4 Me. 168; Brinley v. Whiting, 5 Pick. (Mass.) 348; Pepper v. Haight, 20 Barb. (N. Y.) 429. That the penalties were not in force in Georgia, see Milsaps v. Johnson, 22 Ga. 105.

⁷ Graves v. Leather, 17 B. Mon. (Ky.) 665; Walters v. Hutton, 85 Tenn. 109. But

ever, that the grantee can release to the disseisor and so perfect the latter's title,¹ or if he does not do that, can recover the land of the grantor if the latter regains possession.² Moreover, equity will not decree a rescission of the deed at the suit of the grantor³ any more than it will enjoin an action by the grantor for the purchase money, or compel the return of consideration paid,⁴ but in general will leave the parties to their legal remedies.

A deed may be void as to one piece of land adversely held, and good as to other pieces not so held.⁵ In New York a deed of a large parcel not adversely held will pass title to a small part, not in the grantor's possession because of a disputed boundary line,⁶ and to appurtenant rights in dispute;⁷ and in Massachusetts, though in such case the title to the small part was held not to pass,⁸ the grantee by removing the fence to the true line and remaining in possession could defend on his grantor's title.⁹

Adverse possession, moreover, need not have existed for any special time to make a deed bad; it is enough that it exists at the

see *Farnum v. Peterson*, 111 Mass. 148, 151, where there is a *dictum contra*, and see *Crowley v. Vaughan*, 11 Bush (Ky.) 517.

¹ *Farnum v. Peterson*, *supra*.

² *Coogler v. Rogers*, 25 Fla. 853. The traditional statement that the title remains in the grantor, but that as between himself and his grantee he is estopped to deny that it has passed to the grantee (see *Farnum v. Peterson*, *supra*, at p. 151; 4 Kent Com. 448) should be abandoned. The true way of looking at it is to say that the title has passed to the grantee, but that the adverse holder cannot be prejudiced by that fact and cannot use it as a defence to an action of ejectment brought by the grantor.

³ *Ruffin v. Johnson*, 5 Heisk. (Tenn.) 604. It has also been held that equity will set aside the conveyance at the suit of the adverse holder, but will not vest the fee in the latter. *Wellman v. Hickman*, 1 Smith (Ind.) 407.

⁴ *Woodworth v. Janes*, 2 Johns. Cas. (N. Y.) 417; *Miller v. Mulvey*, 7 Ky. Law. Rep. 40. See *Waters v. Hutton*, 85 Tenn. 109.

⁵ *Goodman v. Newell*, 13 Conn. 75; *McSpadden v. Starrs Mtn. Iron Co.*, 42 S. W. Rep. 497 (Tenn.); *Slatton v. Tenn. Coal, etc., Co.*, 109 Tenn. 415; *Towle v. Smith*, 2 Robt. (N. Y.) 489.

But the grantee may nevertheless be prosecuted for maintenance (*Varrell v. Holmes*, 4 Me. 168) and the penalty recovered for the part adversely held. *Hyde v. Morgan*, 14 Conn. 104.

⁶ *Danziger v. Boyd*, 120 N. Y. 628; *Clark v. Davis*, 28 Abb. N. C. 135; *Allen v. Welch*, 18 Hun (N. Y.) 226. See *Norwalk Heating, etc., Co. v. Vernon*, 75 Conn. 662, where an adjoining structure projected over the land. And see *Lavery v. Moore*, 33 N. Y. 658; *Small v. Hamlet*, 68 S. W. Rep. 395 (Ky.), in accord with New York; *Percifull v. Coleman*, 72 S. W. Rep. 29 (Ky.).

⁷ *Corning v. Troy, etc., Factory*, 40 N. Y. 191.

⁸ *Boston, etc., R. R. Co. v. Sparhawk*, 5 Met. (Mass.) 469. See *Watrous v. Morrison*, 33 Fla. 261, 282, *accord*. Of course under the present Massachusetts statute it would pass. 2 Rev. Laws (1902) c. 127, § 6.

⁹ *Cleaveland v. Flagg*, 4 Cush. (Mass.) 76; *Sparhawk v. Bagg*, 16 Gray (Mass.) 583.

time the deed is delivered.¹ So where the year's possession is not required, the adverse possession need not have been ended for any particular length of time to make the deed good; and therefore, where the disseisee peaceably enters upon the land and there delivers the deed, the grantee gets the title despite the adverse possession.² The entry restores the seisin to the disseisee sufficiently to pass title against the disseisor as well as against others.³ So where the disseisor abandons the land and the disseisee's grantee enters, or the grantee enters on the land when it is vacant, it seems that the grantee's title becomes indefeasible.⁴

A grantee who knows of the adverse possession may yet get title by relation under his deed if it was executed in pursuance of a binding contract entered into before there was any adverse possession.⁵ The fact, however, that a grantee does not actually know of an existing adverse possession does not give him title as against the disseisor, for the adverse possession is constructive notice;⁶ furthermore, the disseisee, having only a right of entry and a right of action, cannot pass them as against the disseisor.

States Abrogating the Common-Law Rule.

In those states where the Statute 32 Hen. VIII, c. 9, and the common-law rule have been abrogated, there can be no doubt that a disseisee transfers to his grantee both his right of entry and his right of action.⁷ In such states the grantee can sue wherever his grantor could,⁸ and it is held that the grantee, acquiring no more

¹ *Cornwell v. Clearing*, 87 Hun (N. Y.) 50; *Green v. Cumberland, etc., Co.*, 110 Tenn. 85; *Sohier v. Coffin*, 101 Mass. 179; *Logan v. Phenix*, 66 S. W. Rep. 1042 (Ky.); *Snyder v. Church*, 70 Hun (N. Y.) 428; *Kincaid v. Meadows*, 3 Head (Tenn.) 188; *Howard v. Howard*, 17 Barb. (N. Y.) 663.

² *Warner v. Bull*, 13 Met. (Mass.) 1; *Farwell v. Rogers*, 99 Mass. 33; *Birthright v. Hall*, 3 Munf. (Va.) 536.

³ But this is not so where the grantor has lost his right of entry before going on the land. *Foster v. Abbott*, 8 Met. (Mass.) 596.

⁴ *McMahon v. Bowe*, 114 Mass. 140, *semble*; *Cleveland v. Flagg*, 4 Cush. (Mass.) 76, 82; *Snow v. Orleans*, 126 Mass. 453. See *Leach v. Woods*, 14 Pick. (Mass.) 461; *Wade v. Lindsey*, 6 Met. (Mass.) 407.

⁵ *Jackson v. Bull*, 1 Johns. Cas. (N. Y.) 81; *Harral v. Leverty*, 50 Conn. 46; *Middleborough, etc., Co. v. Neal*, 105 Ky. 586; *Cardwell v. Spriggs' Heirs*, 7 Dana (Ky.) 36.

⁶ *Jackson v. Demont*, 9 Johns. Cas. (N. Y.) 55; *Bernstein v. Humes*, 71 Ala. 260; *Lowber v. Kelly*, 17 Abb. Pr. 452. *Contra*, *Sewall v. Draughn*, 44 S. W. Rep. 210 (Tenn.).

⁷ The Massachusetts statute is expressly so worded. Stats. of 1891, c. 354. That title passes, see *Walden v. Gratz*, 1 Wheat. (U. S.) 292.

⁸ *Conn's Heirs v. Manifee*, 2 A. K. Mar. (Ky.) 396; *Young v. Kimberland*, 2 Litt.

and no less than his grantor had, takes subject to the statutes of limitation which had begun to run against the grantor.¹ While under our modern procedure the grantee can sue the disseisor in the grantee's own name, his right of action is really founded on his grantor's seisin and must be so regarded wherever that fact is material; for it is the grantor's right of entry and right of action that he owns and exercises. Indeed, that is why the grantee takes subject to the equities of the open adverse holder wherever possession is notice.²

In closing, some explanation should be offered of the fact that in a number of our states the old doctrine in some form still survives. Indeed, it receives vigorous support in one of our newest states.³ Perhaps the best explanation is that given for the Tennessee statutes. Of them it has been said: "It was no fear of nobles or great men or their influence with courts and juries that produced these Tennessee statutes . . . but it was the hostility of public sentiment to the 'land sharks' who were speculating in litigation over defective titles, and particularly to lawyers lending themselves to this speculation for profit, which provoked statutes seeking to enlarge the English acts just because they did not reach the evil sought to be suppressed."⁴ Whatever the reason, the old doctrine retains, and for some time will retain in several states, considerable vitality.

George P. Costigan, Jr.

LINCOLN, NEBRASKA.

(Ky.) 223; *Austin v. Stevens*, 24 Me. 520; *Dillon v. Dougherty*, 2 Grant Cas. (Pa.) 99; *Chicago v. Vulcan Iron Works*, 93 Ill. 222. This is so even though the deed was given just to enable him to sue in the federal courts. *King v. Sears*, 91 Ga. 577.

¹ *Shortall v. Hinckley*, 31 Ill. 219.

² *Haddock v. Wilmarth*, 5 N. H. 181.

³ See *Galbraith v. Paine*, 12 N. Dak. 164.

⁴ *Byrne v. Kansas City, etc., R. R. Co.*, 55 Fed. Rep. 44, 47 (Circ. Ct., W. D. Tenn.).

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EXEMPTION OF STATE AGENCIES FROM TAXATION BY THE NATIONAL GOVERNMENT. —The preservation of our dual system of government demands that the means employed by each sovereign in performing its proper governmental functions be exempt from taxation by the other sovereign, since it would otherwise be within the power of one, by excessive taxation, to cripple the operations of the other.¹ For this reason a state cannot tax a national bank,² nor the salary of a federal officer.³ Conversely, the United States cannot impose stamp duties upon the judicial process of state courts,⁴ or the official bonds of state officers,⁵ or upon tax deeds issued by a state;⁶ nor can it forbid the recording under state laws of an unstamped mortgage,⁷ or tax the salary of a state officer,⁸ or the income of a municipal corporation, since that is a division of the state.⁹ A federal tax on the bond required by state law from a saloon-keeper to secure compliance with statutes regulating the sale of liquor has also been held invalid as an interference with the means adopted by the state under its police power to regulate the liquor trade,¹⁰ although it is hard to see how such a tax impedes the state in such regulation.

¹ See *Cooley*, Const. Lim., 7th ed., 680, 683.

² *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316.

³ *Dobbins v. Commissioners of Erie County*, 16 Pet. (U. S.) 435.

⁴ *Fifield v. Close*, 15 Mich. 505.

⁵ *State v. Garton*, 32 Ind. 1.

⁶ *Sayles v. Davis*, 22 Wis. 225.

⁷ *Moore v. Quirk*, 105 Mass. 49.

⁸ *Collector v. Day*, 11 Wall. (U. S.) 113.

⁹ *U. S. v. R. R. Co.*, 17 Wall. (U. S.) 322; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429.

¹⁰ *U. S. v. Owens*, 100 Fed. Rep. 70; *Ambrosini v. U. S.*, 187 U. S. 1.

As the scope of the state's operations widens with the growing complexity of social and economic conditions, the problem of determining what are proper governmental functions becomes increasingly difficult. This is illustrated by a recent case in the Supreme Court of the United States. The state of South Carolina, in its efforts to regulate the liquor traffic, had established a dispensary system, and prohibited the sale of liquor by any but its own officers, who sold under certain wholesome restrictions. Under its internal revenue system, the United States imposed upon the dispensers a license tax, from which the state claimed exemption on the ground that the dispensary system was a means employed by it in the execution of its police power. The court, however, though bound by a previous ruling¹¹ to concede that this dispensary system was a valid exercise of the state's police power, supported the tax on two main grounds: first, that unless it were held valid, the states might cut off the nation's income by engaging in all the industries subject to internal revenue taxes; and second, that in carrying on the liquor business the state was not performing the ordinary functions of a government. A minority of the court, in a strong dissenting opinion, took issue on the second point, and further argued that not only did the first point lose its force because of the undoubted power of the states to cut off the nation's revenue directly by absolutely forbidding the sale of liquor entirely, but also that it amounted to this: "that the government created by the Constitution must now be destroyed, because it is possible to suggest conditions, which, if they arise, would in the future produce a like result." *State of So. Carolina v. U. S.*, U. S. Sup. Ct., Dec. 4. 1905.

Though opinions may differ as to what are the proper functions of state government, it seems that the majority of the court, influenced by the nightmare of a socialistic state contributing nothing to the national revenue, drew the line in this case much too sharply. Nothing comes more clearly within the police power of a state than the liquor trade. Nothing is more clearly a governmental function than the exercise of the police power. If, as the Supreme Court itself has held,¹² the state in engaging in the liquor business, is making a valid use of its police power, and is not engaging in a private business for profit, it would seem to follow that in so doing it is performing a governmental function which must not be interfered with by taxation.

POWERS COUPLED WITH AN INTEREST. — The authority of an agent may, in general, be revoked at will by a principal. But where a power of attorney is given as security, it is irrevocable *inter vivos*.¹ To the general rule that all agencies are terminated by the principal's death, the only well-recognized exception is that of a power coupled with an interest. The act of the agent being conceived of as the act of the principal, this necessarily follows, since the act of a dead principal would be an impossibility; but where the agency is coupled with an interest, the act may be valid as the act of the agent even after the principal's death. To define this interest, therefore, becomes of grave importance.

The prevailing American view is that the interest must be an interest

¹¹ See *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438.

¹² *Vance v. Vandercook Co.*, *supra*.

¹ *Walsh v. Whitcomb*, 2 Esp. 565.

in the thing itself which constitutes the subject matter of the agency, and not a mere interest in the proceeds from the exercise of the power.² Thus a power of sale in a mortgage, a power to carry on a business together with an assignment of the business, are powers coupled with an interest;³ while a power to sell property and reimburse one's self from the proceeds, a power to an insurance agent to retain fifty per cent of the premiums as commissions, are examples of powers not coupled with an interest.⁴ Mere possession of the subject matter of the agency has been held in an early New York case to be such an interest as will render the power irrevocable,⁵ though this seems to be doubted in a recent decision of the Appellate Division of the New York Supreme Court which fails to mention the earlier adjudication. *Hoffman, Administrator v. Union Dime Savings Institution*, 109 N. Y. App. Div. 24. An apparent extension of the rule to an entirely new class of cases is made by the United States Supreme Court in holding that a power given to a firm of attorneys to prosecute and compromise a suit and to receive a percentage of the proceeds as compensation is not terminated by the principal's death, being coupled with an interest.⁶ Its principle has, however, been limited and in effect, it would seem, overruled by a subsequent decision of the same court in which the only distinction made was that the authority did not include a power to compromise.⁷ The trend of recent decisions seems to favor strongly the narrower definition.⁸ The conception of a power coupled with an interest is found in Coke, whose definition corresponds with that to be found in the American cases.⁹

The modern English view, however, is said to be broader. Where a power is given for a valuable consideration to secure some benefit to the donee of the authority, the power is said to be coupled with such interest as to make it irrevocable.¹⁰ This does not require an interest in the subject matter of the agency; an interest in the proceeds from the exercise of the power is sufficient. On the continent, indeed, the law seems settled in favor of the broader rule.¹¹ The issue in the English cases, however, was as to the revocability of the power *inter vivos*, an entirely different thing from its termination by death; and they could have been decided in the same way under the narrower rule laid down by Chief Justice Marshall.² While the statements of text-writers and the language used by courts undoubtedly do go so far as to consider such a power not terminated by the principal's death, no express decision has been found in support of the broader doctrine.

CIVIL LIABILITY ARISING FROM VIOLATION OF MUNICIPAL ORDINANCES.—An exception, everywhere recognized in the United States, to the fun-

² *Hunt v. Rousmanier's Admrs.*, 8 Wheat. (U. S.) 174.

³ *Conners v. Holland*, 113 Mass. 50; *Durbrow v. Eppens*, 65 N. J. Law 10.

⁴ *Fisher v. Southern Loan & Trust Co.*, 138 N. C. 90; *Andrews v. Travelers' Insurance Co.*, 24 Ky. Law Rep. 844.

⁵ *Knapp v. Alvord*, 10 Paige (N. Y.) 205.

⁶ *Jeffries, Admr. v. The Mutual Life Insurance Co.*, 110 U. S. 305.

⁷ *Missouri, ex rel. Walker v. Walker*, 125 U. S. 339.

⁸ *Fisher v. Southern Loan & Trust Co.*, *supra*; *Andrews v. Travelers' Insurance Co.*, *supra*; *Black v. Harsha*, 7 Kan. App. 794.

⁹ Co. Litt. 49b, 52b, 181b.

¹⁰ *Smart v. Sandars*, 5 C. B. 895, 917; *In re Hannan's Express Gold Mining & Developing Co.*, [1896] 2 Ch. 643.

¹¹ See 1 Holtzendorff, *Encyklopädie der Rechtswissenschaft* 599.

damental rule that the authority to make laws cannot be delegated by the legislature, allows certain powers of local legislation to be conferred upon municipal corporations. The police powers of the state are commonly granted to municipalities, and ordinances passed under that delegated power are as binding within the municipal limits as are the acts of the legislature itself.¹ There is no conflict as to the direct effect of such ordinances, but courts differ in interpreting the indirect effect. The Supreme Court of Missouri recently refused to follow the earlier decisions in that state,² which hold that civil liability between individuals cannot be created by municipal ordinance. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107.

It is the generally accepted doctrine that such liability may result from legislative enactment and that a private individual can recover in a tort action if he is damaged by a breach of duty imposed by the legislature. Courts state the ground for recovery in different ways. Some call the breach negligence *per se*.³ Others call it *prima facie* evidence of negligence.⁴ They all go so far as to hold that if the legislature imposes a duty which is owed to citizens as individuals and not to the municipality or public at large, a plaintiff to whom the duty is owed, can, unless the legislature has showed a contrary intent, recover for damage caused to him by a breach. The liability of the defendant is really not based upon negligence, as the exercise of care cannot be offered as a defense. Nor is he absolutely liable for the results of his unlawful action, for it has been held that the defendant may show a justification for his violation of the law and thus escape civil liability.⁵ It is of course necessary for the plaintiff to establish the causal relation between the defendant's breach and his own damage in order to make out his case, and the mere fact that the defendant is acting unlawfully at the time is not enough to make him liable.⁶ The liability results from the legislature's implied intent to impose it. The duty in many statutes is created wholly or in part for the benefit of individuals. The temptation to violate the duty for the sake of pecuniary gain is frequently so great that it is advisable to add to the penalty expressly imposed civil liability in those cases where the breach results in damage to an individual.

A few jurisdictions refuse to allow a tort action when the duty is imposed by a municipal ordinance.⁷ They argue that the municipality is empowered to pass laws for particular local purposes, but that it cannot create new civil liabilities between individuals. They hold that limited punishments may be inflicted by the municipality for breach of the ordinances, but that the legislature cannot delegate the power to subject individuals to civil liability where the damages recoverable have no definite limit. The only duty owed under an ordinance, according to these authorities, is to the municipality.

A large majority of jurisdictions, however, make no distinction between legislative and municipal enactments,⁸ and this position seems correct. An act of the legislature passed under the police power creates civil liability.

¹ *Barbier v. Connolly*, 113 U. S. 27.

² See *Byington v. St. Louis Rd. Co.*, 147 Mo. 673.

³ *Dodge v. The Burlington, C. R. & M. Rd. Co.*, 34 Ia. 276.

⁴ *The Illinois Central Rd. Co. v. Gillis*, 68 Ill. 317.

⁵ See *Hanlon v. South Boston Horse Rd. Co.*, 129 Mass. 310.

⁶ *Briggs v. The New York Central, etc., Rd. Co.*, 72 N. Y. 26.

⁷ *Philadelphia and Reading Rd. Co. v. Ervin*, 89 Pa. St. 71.

⁸ *Hayes v. Michigan Central Rd. Co.*, 111 U. S. 228.

The legislature can delegate the right to pass that act. It is difficult to see why the act should have one effect when the legislature passes it itself, and another when the legislature's delegate passes it. It is binding law in both cases. In each a duty is created. There is no evidence that the legislature intends to delegate only part of its power. If the legislature creates the duty by a clause in the city's charter, the duty is owed to individuals. If the charter empowers the municipality to create the duty, it is reasonable to suppose that the legislature intends the same result to follow.⁹

RESCISSION AND REFORMATION FOR MUTUAL MISTAKES OF FACT. — A distinction should be drawn between three classes of cases in which, on account of a mutual mistake of fact, equity is asked to give affirmative relief in the nature of rescission or reformation. The simplest of them arises from a failure to complete the formation of a legal contract. For example, the ostensible agreement may be capable of two reasonable interpretations, one of which is accepted by each party, as where A, with two lots in Boston, agrees to sell "my lot in Boston." Other elements of a contract, a supposed party, or consideration, may be non-existent. Since the invalidity of the contract is recognized at law, the intervention of equity is generally unnecessary. If, however, a bond or a deed has been delivered by way of partial performance, a bill *quia timet* might bring relief through cancellation of the instrument. In a second class of cases a legally valid contract has been entered into under a mutual mistake as to certain material facts which form the conscious inducement of the contract. The mutual error may be as to the quality or identity of land sold, the quantity of land in a parcel (rescission, however, being usually granted in the latter case only where the error is considerable), the nature or character of a chattel. Here there can be no true reformation, since there is no previous contract with which the mistaken agreement can be squared. Hence equity will conclude that there would have been no contract had the mutual error not been made, but cannot go further and create the contract that might have been formed. Sometimes, as where a party has received more or less land than he paid for, and justice is best subserved thereby, equity may allow the defendant an election between rescission and a money payment.¹ But ordinarily rescission is the only remedy.² In a recent New York case, for example, a real estate broker employed to sell lot A mistakenly pointed out lot B as the one for sale. The plaintiff agreed to buy and signed a contract properly describing lot A. Because of the blunder the court properly decreed a rescission. *Silverman v. Minsky*, 109 N. Y. App. Div. 1. Had authority been given the agent to dispose of lot B also, the case might be one for reformation on the principles which govern the third class of cases.

In this class there is an initial contract, the expression or performance of which in a written contract or deed is, because of mutual mistake or the mistake of one party and the fraud of the other, incorrect. Here equity makes the performance or contract conform to the original agreement by such decree as seems proper. To this end one who has gained or retained

⁹ See *Taylor v. The Lake Shore, etc., Rd. Co.*, 45 Mich. 74.

¹ *Lawrence v. Staigg*, 8 R. I. 256; *Miller v. Craig*, 83 Ky. 623.

² *Hitchcock v. Giddings*, 4 Price 135; *Bigham v. Madison*, 103 Tenn. 358.

property through the mistake in performance is said to be under an equitable obligation, broadly termed a constructive trust, to convey it to the other contracting party.³ Where, as might be true in the principal case, the writing has omitted land comprised in a prior oral agreement, some courts have refused to compel reformation, on the ground that they would be enforcing specific performance in the teeth of the Statute of Frauds.⁴ But in all these cases mistake, and not a contractual right of specific performance, is the basis of equitable relief.⁵ Business understanding and convenience, to be sure, forbid that mistake or surprise should always give rise to an equity. But the retention of property or of a written contract may at least, in the circumstances noted, be fastened upon as an unjust enrichment, analogous to that arising from actual fraud.

POWER OF STATE TO EXCLUDE FOREIGN CORPORATIONS. — The growing hostility towards corporations, especially those engaged in inter-state business, has led to highly restrictive regulations and, frequently, total exclusion by states of certain classes of foreign corporations.¹ This renders timely a brief inquiry, in a recent article, into the limitations upon this power of a state. *Upon the Power of One State to Exclude the Corporations of Another*, by Eugene F. Ware in 17 Green Bag 699.

A corporation is a creature of local law and cannot exist outside of the state of its creation. Yet, like a natural person, it may act elsewhere through agents. Whether a state will recognize the existence of a foreign corporation and permit it to do business therein is determined solely by the laws of that state. The common law, however, has generally recognized a foreign corporation.² But, in the absence of constitutional limitations, the state has an undoubted right to regulate or exclude foreign corporations.³ To the Constitution, then, we must look for the curtailment of a state's right of control over foreign corporations. That a corporation is not entitled to the privileges of "citizens" under Article IV, sec. 2, is settled.⁴ And, although a corporation is a "person" within sec. 1 of the Fourteenth Amendment, forbidding the denial of the equal protection of the laws "to any person within the jurisdiction,"⁵ this does not prevent a state from imposing conditions to the admission into the jurisdiction of a foreign corporation, and a state may discriminate against different foreign corporations in imposing conditions upon their right to enter the state.⁶ Though the power to license implies the right to revoke, a state cannot, however, deprive a corporation of rights of property or contracts gained during its licensed activity, nor yet impair its own contract with the corporation.⁷

³ *Cole v. Fickett*, 95 Me. 265.

⁴ *Glass v. Hulbert*, 102 Mass. 24; *Davis v. Ely*, 104 N. C. 16. See also *Petes v. Hambach*, 48 Wis. 443.

⁵ *Comstock v. Coon*, 135 Ind. 640. See 2 Pomeroy, *Eq. Jurisp.*, 3d ed., § 867 and note.

¹ See Beale, *Foreign Corp. Chap. VII*.

² *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 589.

³ *Watts-Pierce Oil Co. v. Texas*, 177 U. S. 28.

⁴ *Paul v. Virginia*, 8 Wall. (U. S.) 168.

⁵ *Smyth v. Ames*, 169 U. S. 466, 522.

⁶ *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110.

⁷ See *Bedford v. Eastern Building and Loan Ass'n*, 181 U. S. 227; *N. Y., Lake Erie, etc., Co. v. Pennsylvania*, 153 U. S. 628.

The only constitutional limitations upon the right to exclude would seem to be found in the commerce clause, in the right to issue letters patent, and in the omnibus clause, securing the power to enact all necessary laws to carry congressional power into execution. A corporation endowed with federal privileges or engaged in federal business cannot be controlled or regulated by state interference except in the exercise of local police regulations.⁸ But by culling expressions from a number of Supreme Court decisions, Mr. Ware has succeeded in enumerating ten limitations. Some of them, based on merest *dicta*, are rejected by the writer. Two, however, merit consideration. One is based on a decision declaring unlawful the arrest of an engineer of a railroad which failed to take out a permit which by its terms became void upon appeal by the corporation, in any litigation, to the federal courts.⁹ The generalization drawn, that the burden imposed on a corporation cannot involve the surrender of a right or privilege secured by the Constitution, leaves out of consideration a square holding, which still stands, that though an agreement not to sue in the federal courts is invalid, the state may make the breach of such agreement a ground for revocation of its license, thus giving the corporation the option of not seeking the federal courts or ceasing to do business in that state.¹⁰ The court expressly declared that it could not concern itself with the motive or reasonableness of a state's terms, since the corporation had no constitutional right to do business in the state. Nevertheless, another decision¹¹ declaring unconstitutional a state provision giving a preference to domestic creditors of an insolvent foreign corporation is deemed, in conjunction with another *dictum*, as, perhaps, committing the Supreme Court to the doctrine that a state cannot exclude a foreign corporation without good reason or just cause. The soundness of the particular decision is, in the light of the vigorous dissent, highly questionable. But certainly it does not warrant, as the writer himself seems to surmise, the conclusion he seeks to draw. On the whole, the narrow, well-defined limitations upon a state's power over foreign corporations can hardly be said to be extended by recent decisions, — a result highly unlikely, whether desirable or not, in view of a want of constitutional justification of the impairment of state sovereignty.

EFFECT OF APPOINTMENT OF RECEIVER ON STATE PRIORITY. — By the common law, the crown was a preferred creditor.¹ Its right of priority, however, was not absolute. It could not be enforced against assets the title to which the debtor had transferred to another before the suing out of the writ of extent (by which the crown's right was enforced), unless, of course, such transfer could be set aside for fraud. Thus it was held that an assignment in trust for the equal benefit of all creditors destroyed the

⁸ *Crutcher v. Kentucky*, 141 U. S. 47; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9.

⁹ *Barron v. Burnside*, 121 U. S. 186.

¹⁰ *Doyle v. Continental Insurance Co.*, 94 U. S. 535. See Beale, *Foreign Corp.* § 122.

¹¹ *Blake v. McClung*, 172 U. S. 239. See 12 HARV. L. REV. 429.

¹ *King v. Cotton*, Par. 112.

preference.² A lien, too, obtained by a third party was secure,⁸ but a mere change in custody was of no effect.⁴

In this country there has developed a divergence of opinion among the state courts; some holding that the states, as successors to the sovereignty of the king, became invested with his right of priority;⁶ and others repudiating the whole doctrine as inconsistent with our altered political conditions.⁶ The courts which do adhere to the rule of state priority subject it to the English restriction that it is liable to be defeated *pro tanto*, by prior legal interests vested in third parties. Thus we find that the leading case on the subject in this country denies the state's claim to preference after an assignment in trust for creditors.⁷ And, recently, it has further been held by the supreme court of Maryland that the state's preference did not survive against a receiver in whom the statute⁸ vested title to the assets of an insolvent corporation. *State v. Williams*, 61 Atl. Rep. 297.

The result then of an action by the state claiming priority against a receiver, in any jurisdiction where the doctrine of state priority is accepted at all, must turn simply upon the question of receiver's title.

Under the old law, no title was vested in any receiver by the order appointing him,⁹ for the order issued from a court of equity which had jurisdiction *in personam* only and was therefore incapable of dealing immediately with the title to a *res*. To-day, however, as in the principal case, receivers, and particularly corporation receivers, are by statute invested with title to the debtor's assets from the moment of appointment.¹⁰ Certain text writers might well leave one with an impression that courts of equity now assume to pass title, at least to a debtor's personalty, into the receiver without the assistance of any statute.¹¹ It is true that some statutes have been held to pass title to personalty only,¹² and that some which do not refer expressly to either personalty or realty have been so broadly construed as to pass title to both by implication.¹³ But it is believed that no case goes so far as to hold that a court of equity may, without legislative assistance, vest the receiver with title, save mediately by means of an assignment from the debtor. If, then, in a jurisdiction where the state's right to priority against the original debtor is recognized, the state attempts to obtain a preference against the receiver before an assignment, it must succeed in the absence of some affirmative enactment construed to pass title at the time of appointment.

EXTINGUISHMENT OF RIPARIAN RIGHTS. — To prevent land from being encumbered, the courts generally have established differing rules for the revocation of parol licenses to do acts affecting land interests according

² *King v. Lee*, 6 Price 369.

³ *King* (in aid of Braddock) *v. Watson*, 3 Price 6.

⁴ *In re Henley & Co.*, 9 Ch. D. 469.

⁵ *Robinson v. Bank of Darien*, 18 Ga. 65, 96.

⁶ *Freeholders of Middlesex Co. v. State Bank*, 30 N. J. Eq. 311.

⁷ *State of Maryland v. Bank of Maryland*, 6 Gill & J. (Md.) 205.

⁸ Art. 23, § 382, Code of Public and General Laws of Maryland.

⁹ *Keeney v. Home Insurance Co.*, 71 N. Y. 396.

¹⁰ *Cf. Re Attorney-General v. Atlantic, etc., Co.*, 100 N. Y. 279.

¹¹ Alderson on Receivers 211, note 4; Beach on Receivers, 2d ed. 202, note 4; 23 Am. & Eng. Encyc. of Law 1046.

¹² *Skinner v. Terhune*, 45 N. J. Eq. 565.

¹³ *American National Bank v. National, etc., Co.*, 70 Fed. Rep. 420.

to the circumstances of the permission. If the parol license is to do an act on the licensor's land which will create an easement, it is revocable even though the licensee has acted to his detriment.¹ When, however, the permission is to do an act on the licensee's land which will extinguish an already existing easement, the license if acted upon becomes irrevocable.² The application of these rules to the disposition of water rights in a stream has been confused. An early English case,³ the result of which has been apparently followed in England⁴ and in some states in this country,⁵ held that a parol license to an upper riparian owner to divert water could not be revoked when acted upon. This decision was based on the theory that a riparian owner's rights depended upon actual use of the stream. The court regarded the parol license acted upon as in effect an acknowledgment that the owner no longer intended to use the stream, and so an abandonment of the right. This conception of riparian rights has since been abandoned. It has become established that the riparian owner has a natural right to the flow of the water as an incident to his property independent of use.⁶

Another view by which *Liggins v. Inge* is explained is to regard this natural right as analogous to an easement, since it imposes a restraint on the upper owner's use of his land. Accordingly, a license to divert, though it causes a permanent damage to the licensor's land, is a license to extinguish an easement and hence irrevocable. Some of the text-writers apparently have taken this view.⁷ The objection to it is that, even if the hypothesis be granted, the conclusion does not follow, for it should be against the policy of the law to allow such an easement to be extinguished by parol license when the result is also to abridge a natural right. This very objection points to another solution: to regard this derogation of a natural right not as the extinction but rather as analogous to the creation of an easement. When the riparian owner acquires the land, he receives a collection of natural rights, among them the right to take the water from the stream. Depriving him of the right is creating an interest against his land which might well be classed as an easement, though it is not within the technical definition.⁸ Indeed, the definition is immaterial; whether it is called an easement or the extinction of a natural right incident to property, both expressions signify the same thing, — the creation of an interest in land. Such an interest should be subject to the same formalities necessary to transfer any estate in land.⁹ Thus the California Supreme Court has recently considered the transfer by parol license of a similar¹⁰ right to waters in a stream to be within the Statute of Frauds. *Churchill v. Russell*, 82 Pac. Rep. 440.

A parol license, then, to divert water from a stream should be revocable, like any other parol license to create an easement. When, however, as in

¹ *Fentiman v. Smith*, 4 East 107. *Lee v. McLeod*, 12 Nev. 280, *contra*.

² *Morse v. Copeland*, 2 Gray (Mass.) 302.

³ *Liggins v. Inge*, 7 Bing. 682.

⁴ See *Davies v. Marshall*, 10 C. B. (N. S.) 711.

⁵ *Addison v. Hack*, 2 Gill (Md.) 221.

⁶ *Embrey v. Owen*, 6 Exch. 369. See Goddard, *Easements*, 6th ed., 83.

⁷ See Gould, *Waters*, 1st ed., § 322; Angell, *Watercourses*, 7th ed., § 316.

⁸ See Gale, *Easements*, 1st ed., 2.

⁹ See *Doyle v. San Diego Land and Town Co.*, 46 Fed. Rep. 709; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142 (reversed in 21 N. J. Eq. 463 on another ground). See also Farnham, *Law of Waters*, 1st ed., 2345.

¹⁰ See Pomeroy, *Riparian Rights*, 1st ed., § 15, for law peculiar to California and other western states.

this California case, there is an agreement founded upon a valid consideration, and partly performed so as to alter materially the position of the party performing, the case may be brought within the established equitable doctrine allowing specific performance of parol contracts.¹¹

JURISDICTION IN AN ACTION FOR INFRINGEMENT OF FOREIGN PATENT. — In the United States the courts will entertain suits for foreign torts, whether common law or statutory, unless the cause of action is repugnant to the public policy or morals¹ of the home state; and the question of whether the *lex fori* would give a remedy for the same cause arising within the state, is considered only as evidence of whether morals or policy would be offended against by such action.² The English rule as laid down in the case of *The Halley*,³ which must now be taken as settled law, is less liberal than the American, and denies that the courts have jurisdiction to entertain any suit for a tort committed abroad, unless the act would have been tortious by the principles of the English law. A late case in Victoria has denied the right to sue there for the infringement of a patent in New South Wales, one of the justices taking the ground that the combination of chemicals complained of, if it had been made in Victoria, would not have infringed any patent there existing. *Potter v. Broken Hill Proprietary Co.* (1905), Vict. L. Rep. 612.

We believe that the justice erred in his interpretation of the rule which he was applying, when he insisted that the criterion was whether the physical actions of the defendant would have been actionable if stripped of their context of local rights and obligations and transferred to the home state. The rational basis of the English rule is the feeling that the courts should not be required to hear suits for foreign causes of action which would have been deemed trivial or impolitic if they had arisen at home. But the infringement of a patent right would have been a tort if it had occurred in Victoria. And to argue that the physical acts of the defendant would not have been an actionable infringement of patent in Victoria because there was no patent there to infringe is as irrelevant as to argue that the blow of a defendant sued in England for an assault in France would not have been a tort in England because the person of the plaintiff would have been safe across the channel. This particular infringement could not have occurred in Victoria, but the essential fact is that if an infringement had occurred there, redress would have been given under Victorian law.

The broader interpretation suggested above, as opposed to the construction of the Victoria judge, makes the English rule more nearly consistent with that applied in similar cases in America, and with the general common law rule as to foreign contracts, which allows recovery unless the agreement sued on was against the morals or policy of the home state;⁴ and there is no consideration of principle or expediency offsetting the failure of justice which arises from allowing a tortfeasor to escape restitution by moving

¹¹ *Devonshire v. Eglin*, 14 Beav. 530.

¹ *Herrick v. Minneapolis, etc., Ry. Co.*, 31 Minn. 11; *Dennick v. Railroad Co.*, 103 U. S. 11.

² *Cf. Leman v. Baltimore, etc., R. R. Co.*, 128 Fed. Rep. 191.

³ *The Halley*, L. R. 2 P. C. 193; *cf. Phillips v. Eyre*, L. R. 6 Q. B. 1-28.

⁴ *Columbia, etc., Ass'n v. Rice*, 68 S. C. 236.

across a boundary line. Unfortunately, by sheer weight of authority and sanction of time, the rule must still stand that there can be no recovery for trespass to foreign realty,⁵ though even here there is some dissent.⁶ Otherwise the one sensible and consistent principle to be applied to personal actions is that laid down by Dicey, that "any right which has been duly acquired under the law of any civilized country is recognized and in general enforced by English courts," unless "the enforcement of such right is inconsistent with the policy of English law."⁷

RECENT CASES.

AGENCY — TERMINATION OF AUTHORITY — POWER COUPLED WITH AN INTEREST. — The plaintiff's intestate delivered to her agent her savings bank book in the defendant bank, together with a power of attorney to deposit and draw money. After her death, but before the defendant learned of her death, the defendant made payments to the agent. There was no evidence of an intention on the part of the intestate to make a gift or pledge to the agent. *Held*, that the bank is liable for the amount paid over, as the power of the agent was not coupled with an interest and was therefore terminated by the death of the principal. *Hoffman, Administrator, v. Union Dime Savings Institution*, 109 N. Y. App. Div. 24. See NOTES, p. 287.

AGENCY — UNDISCLOSED PRINCIPAL'S RIGHTS WITH RESPECT TO THIRD PERSONS — OFFER TO CONTRACT ADOPTED BY UNDISCLOSED PRINCIPAL BEFORE ACCEPTANCE. — A, in his own name, made an offer to sell a certain crane to the defendant. The plaintiff then purchased the crane and authorized A to proceed with the transaction as his agent. The defendant afterwards accepted the offer. *Held*, that the plaintiff cannot sue the defendant on the contract. *Mooney v. Williams*, 5 N. S. W. 304.

When a simple contract is made by a person acting as agent for an undisclosed principal, that principal may, in certain cases, be sued and sue on the contract in his own name. *Paterson v. Gandasequi*, 15 East 62; *Sims v. Bond*, 5 B. & Ad. 389. The true basis of this anomalous doctrine seems to be that although the contracting party is really the agent, yet the relations existing *de facto* between the agent and his principal render it just that under certain circumstances the principal be allowed to sue and be sued as if he were the real contracting party. See *Railton v. Hodgson*, 4 Taunt. 576, 577 (note). Otherwise the recognized exceptions to an undisclosed principal's liability are wholly illogical. See STORY, AGENCY, 9th ed., § 449. But the agency must at the very latest exist when the contract is closed. Subsequent ratification will not suffice where the agent purports to act as principal. *Keighly, etc., Co. v. Durant*, [1901] A. C. 240. It seems, however, that this relationship need not be contemporaneous with the express offer. The offeree theoretically accepts that offer which he has reasonably been led to believe the offerer is making to him at the moment of his acceptance, the offer being regarded as continuing till this time. But at this moment when the theoretical offer is made and accepted, the offerer is agent. The principal may, therefore, have the right to sue. Practically, it is an undesirable formality to require the withdrawal of an offer merely to repeat it immediately in identical language after the offerer has become agent for the undisclosed principal.

⁵ *British, etc., Co. v. Companhia de Moçambique*, [1893] A. C. 602; *Allin v. Conn*, etc., Co., 150 Mass. 560.

⁶ *Little v. Chicago, etc., Ry.*, 65 Minn. 48.

⁷ Dicey, *Conflict of Laws* 22, 32.

ALIENS — WHETHER A STATE COURT MAY VACATE ITS DECREE OF NATURALIZATION ON ACCOUNT OF FRAUD. — A county court of a state granted to the plaintiff in error, an alien, a certificate admitting him to United States citizenship. This certificate was obtained by a fraudulent representation of the applicant. The county attorney, as officer of this court, petitioned on this ground to have the certificate set aside. *Held*, that the petition cannot be granted. *Peterson v. State*, 89 S. W. Rep. 81 (Tex., Civ. App.).

The power to naturalize is vested by the Constitution in Congress, but this power has been conferred by statute upon certain state courts. U. S. Rev. St. § 2165. Such courts, when engaged in admitting aliens to citizenship, are regarded, like true federal courts, as agents of the United States government. *Re Christern*, 43 N. Y. Sup. Ct. 523; *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y.) 358. The decrees of naturalization granted by these agent courts have the force and effect of judgments. *Spratt v. Spratt*, 4 Pet. (U. S.) 393. As in the case of other judgments, however, the rule is that they may, if obtained by fraud, be set aside at the instigation of the defrauded party. *United States v. Norsch*, 42 Fed. Rep. 417. In the present case it is clear that the United States was a party to the original judgment through the medium of the county court. But the question remains, did it continue a party to the petition by the county attorney as agent for such court? If so, the above rule permitting judgments to be set aside on the ground of fraud would apply. The court, in answering this question in the negative, reads strictly, according to the ordinary rule of statutory interpretation, the statute delegating to county courts the power of naturalization. But it has been held that a United States circuit court has power to set aside a similar decree if obtained by fraud; and it may be doubted whether the statute did not intend to grant the same power to the county court. See *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140.

BANKRUPTCY — DISCHARGE — LIABILITIES FOR SUPPORT OF WIFE OR CHILD. — The Act of February 5, 1903, amendatory to the National Bankruptcy Act of July 1, 1898, provided that a discharge in bankruptcy should release a bankrupt from all of his provable debts, except such as are "liabilities . . . for maintenance or support of wife or child." (U. S. Comp. St. Supp. 1903, 411.) *Held*, that this excepting clause does not apply to a debt incurred for the services of a physician called by the husband to attend the wife. *In re Ostrander*, 139 Fed. Rep. 592 (Dist. Ct., E. D., N. Y.).

Under the Act of 1898, by the weight of authority, liabilities incident to support or bastardy orders were not dischargeable in bankruptcy. *In re Baker*, 96 Fed. Rep. 954; *Wetmore v. Markoe*, 196 U. S. 68. Nor was a bankrupt's debt arising out of an express contract to support his children discharged. *Dunbar v. Dunbar*, 190 U. S. 340. Liabilities, therefore, in the nature of direct enforcements of the common law duty to support wife and child were excepted from discharge, but not those contractual obligations incidentally incurred in the performance of that duty. The excepting clause of the Act of 1903 can scarcely apply to this latter form of liabilities, as such a construction would exempt all debts for family necessities from discharge in bankruptcy, a result clearly not intended. The clause, therefore, seems to be simply declaratory of the meaning of the Act of 1898, as previously interpreted by the courts, and has been so regarded. See *Wetmore v. Markoe*, *supra*. The case at hand, by its decision and *dictum*, confines the clause in question to those direct liabilities entailed by non-performance of the common law duty to support wife and child, and seems sound in its conclusion.

BANKRUPTCY — PREFERENCES — PERFECTING INCHOATE RIGHT TO SECURITY. — The defendant, who held mortgages on the real estate of a bankrupt which had been executed in good faith for contemporaneous loans of money, had them recorded within four months of the commencement of bankruptcy proceedings. By the law of Minnesota such mortgages were not valid against *bona fide* purchasers and attaching and judgment creditors until recorded. *Held*, that the mortgages were not originally preferences, and a failure to record until

within four months of bankruptcy proceedings does not make them so. *Seager v. Lamm*, 104 N. W. Rep. 1 (Minn.).

For a discussion of the principles involved, see 18 HARV. L. REV. 606.

CARRIERS — DISCRIMINATION — EXCLUSIVE PRIVILEGES IN RAILROAD STATION GRANTED TO ONE HACK COMPANY. — The plaintiff was lessee of a large Union Station in Chicago. In order to protect its passengers from excessive solicitation by the numerous hackmen who frequented the station platforms, the plaintiff granted to one carriage company the exclusive right to enter the station to solicit passengers. The excluded hackmen, among whom were the defendants, continued to enter the station. The plaintiff sought to have the defendants restrained from so doing, and also from standing upon the adjacent sidewalks to solicit custom. The Circuit Court of Appeals granted an injunction restraining the defendants from entering the station, and from so using the adjoining sidewalks as to interfere with the ingress and egress of passengers. The defendants appealed. *Held*, that this decree must be affirmed. *Donovan v. Pennsylvania Company*, 26 Sup. Ct. Rep. 91.

For a discussion of the principles involved, see 19 HARV. L. REV. 144.

CARRIERS — DUTY TO ACCEPT AND CARRY PASSENGERS — BLINDNESS AS GROUND FOR REJECTION. — The plaintiff, a blind man seventy-seven years of age and accompanied by an attendant, sought to purchase a ticket for a railway journey involving two or three changes of cars. The defendant's agent refused to sell it to him unless an attendant was to go with him upon the journey. *Held*, that such refusal was proper. *Illinois Central R. Co. v. Allen*, 89 S. W. Rep. 150 (Ky.).

A Mississippi decision quoted and followed by the present case is discussed in 18 HARV. L. REV. 540.

CONFLICT OF LAWS — RIGHT OF ACTION — INFRINGEMENT OF FOREIGN PATENT. — The plaintiff alleged in Victoria, that it owned a patent in New South Wales and that the defendant there infringed it. *Held*, that the court lacks jurisdiction. *Potter v. Broken Hill Proprietary Co.*, [1905] Vict. L. Rep. 612. See NOTES, p. 295.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT — STATUTE ALTERING CHARTER PROVISION AS TO INTERNAL MANAGEMENT OF CORPORATION. — A corporation was chartered under a general law which authorized it to issue preferred stock with the unanimous consent of the stockholders. A general statute subsequently enacted in pursuance of the state's reserved power to alter charters, permitted the issuance of preferred stock with the consent of the holders of two-thirds of the capital stock. The plaintiff, a stockholder, seeks to enjoin the defendant corporation, which has secured the consent of the holders of two-thirds of the stock from issuing preferred stock. *Held*, that the plaintiff is not entitled to an injunction. *Hinckley v. Schwarzschild, etc., Co.*, 95 N. Y. Supp. 357.

This decision holds that the state under its reserved power can alter the provisions in a charter which define the scheme of internal organization of the corporation, as distinguished from the rights directly conferred by the state.

For a statement of the opposite view, see 18 HARV. L. REV. 549.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTORY PROHIBITION OF MARRIAGE BY EPILEPTIC. — A statute prohibited the marriage of an epileptic when the woman is under forty-five years of age. *Held*, that the statute is constitutional. *Gould v. Gould*, 61 Atl. Rep. 604 (Conn.).

Though similar statutes exist in Kansas, Michigan, Minnesota, and Ohio, this is believed to be the first decision as to their constitutionality. Legislation prohibiting the marriage of insane persons is not analogous, for sanity is an essential of the natural capacity to contract irrespective of any statutory provision. Statutes prohibiting the intermarriage of cousins and other near relatives, and of whites with negroes, have invariably been held constitutional. *Baily v. Cranfill*, 91 N. C. 293; *Lonas v. State*, 3 Heisk. (Tenn.) 287. But the Connecticut statute is much more stringent, for instead of merely restricting the choice, it entirely

prohibits marriage to certain persons. Since epilepsy is a disease which often leaves its mark in inferior offspring, the marriage of epileptics is a matter of public concern and of public health. As the statute is reasonable and affects all persons alike within the sphere of its operation, it is clearly justified under the police power. *Barbier v. Connolly*, 113 U. S. 27; see 10 HARV. L. REV. 450, 524. Analogous to this is legislation forbidding the sale of liquor to Indians, or ordering the confinement of persons infected with contagious diseases. Cf. 11 HARV. L. REV. 414, *Haverty v. Bass*, 66 Me. 71.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO ACT AS EXECUTOR. — *Held*, that a legislative enactment that "no non-resident shall be appointed or act as executor" is not a violation of U. S. Const., Art. 4, § 2, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *In re Mulford*, 75 N. E. Rep. 345 (Ill.).

The Supreme Court of the United States has consistently refused to define these "privileges and immunities" or to describe them in general classifications. See *McCready v. Virginia*, 94 U. S. 391, 395. Yet Mr. Justice Washington's opinion that the constitutional provision extends only to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments," seems not to have been disapproved. See *Corfield v. Coryell*, 4 Wash. (U. S. C. C.) 371, 380. Thus, rights of a civil rather than of a political character are here protected. Accordingly there would not be included the right to hold public office or even to occupy positions of a public nature. See *Austin v. The State*, 10 Mo. 591, 592; 1 Mich. L. Rev. 292-298. As the court in the principal case clearly points out, an executor is a public, or, at least, quasi-public officer. See WHARTON, CONFLICT OF LAWS, 3d ed., § 605. He receives his powers only by the active consent of the courts, is generally allowed a statutory compensation, and is at all times subject to the control and directions of the courts. See CROSSWELL, EXRS. & ADMRS., §§ 5, 177, 181. A statute prohibiting the appointment of a non-resident trustee has been held unconstitutional. *Roby v. Smith*, 131 Ind. 342. But trustees deriving their powers wholly from the creators of the trust have in no sense an official character. See WOERNER, AM. LAW OF ADM., 2d ed., § 10.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY. — A state statute, known as the Kansas Anti-Trust Act, compelled witnesses to testify in regard to violations of that statute, and provided that neither should they be liable to criminal prosecutions for any violations of the act about which they testify, nor should their evidence be used against them in any criminal proceedings. *Held*, that the statute is not in violation of the Fourteenth Amendment, which provides "Nor shall any state deprive any person of . . . liberty . . . without due process of law." Two justices dissented. *Jack v. State of Kansas*, U. S. Sup. Ct., Nov. 27, 1905.

The state statute could not, of course, prevent the testimony of a witness in state proceedings from being used against him in federal courts for violations of federal statutes. For the purposes of this case, the court assumes that, "if the statute failed to give sufficient immunity from prosecution or punishment" to the witness, it would violate the Fourteenth Amendment. The decision is then reached on the basis that the danger of such prosecution in the federal courts is so "unsubstantial and remote" that it is of no consequence that the statute does not provide against it. This decision is in harmony with the same court's opinion in a previous case, that although a federal statute obliging witnesses to testify secured them no immunity in state courts, yet it did not compel self-incrimination within the terms of the Fifth Amendment. *Brown v. Walker*, 161 U. S. 591, 608; see 10 HARV. L. REV. 120. These two cases seem to establish the law that "the legal immunity is in regard to a prosecution in the same jurisdiction; and when that is fully given, it is enough."

CONTRACTS — MASTER AND SERVANT — UNWRITTEN RENEWAL OF A PREVIOUS CONTRACT. — A, under an express contract, employed the plaintiff for

one year at an annual salary. Without further express agreement the plaintiff continued in A's employ for several years, but was discharged in the middle of the year without cause, when A became bankrupt. The plaintiff therefore brings this action against A's assignee in bankruptcy. *Held*, that the plaintiff had a yearly contract with A which entitles him to recover from the defendant for his discharge by A in the middle of the year without cause. *Baker v. D. Appleton & Co.*, 95 N. Y. Supp. 125.

The question in this case is essentially one of fact; did the parties renew the agreement? There was no express renewal, but acts may show as unequivocally as words a mutual intent to be bound. Where the facts as to a contract are not in dispute, their interpretation is a question of fact for the court, not for the jury. *Chicago Cheese Co. v. Fogg*, 53 Fed. Rep. 72. When one enters the employ of another under a contract for a year's service at an annual salary, and continues in the employment after the expiration of the year, the weight of authority seems to be that this raises a presumption of fact that the parties have assented to a renewal of the agreement. *Adams v. Fitzpatrick*, 125 N. Y. 124; *N. H. Iron Factory Co. v. Richardson*, 5 N. H. 294. This presumption of fact, if not rebutted, will sustain the conclusion that, as a matter of law, there was such a contract. *Taylor v. City of Lambertville*, 43 N. J. Eq. 107. And this contract is not open to objection under the Statute of Frauds. *Tatterson v. Suffolk Manufacturing Co.*, 106 Mass. 56.

CRIMINAL LAW — FORMER JEOPARDY — CONVICTION OF HIGHER OFFENSE ON SECOND TRIAL. — On a charge of murder in the first degree, the plaintiffs were convicted of assault by a court of first instance of the Philippine Islands. On appeal to the Supreme Court of those islands, the judgment was reversed and the plaintiffs were convicted of murder in the second degree. *Held*, that the later conviction is not a violation of a legislative provision against double jeopardy. Three justices dissented. *Trono v. United States*, U. S. Sup. Ct., Dec. 4, 1905.

The case is of especial interest as being the first decision by the Supreme Court of the United States upon this point, concerning which the state courts are at variance. But see *United States v. Harding*, 26 Fed. Cas. 131. It is well settled that an appeal by the accused operates as a waiver of the plea of former jeopardy on a second trial. *United States v. Ball*, 163 U. S. 662. The conflict of authority arises as to the extent of such waiver. See WHARTON, CRIM. PLEAD., 9th ed., § 465. The weight of authority is opposed to the decision in question, and regards the accused as waiving the plea of former jeopardy only as to that part of the judgment which convicts him of guilt. *People v. Gordon*, 99 Cal. 227; *contra*, *State v. Bradley*, 67 Vt. 465. To hold that the plea is also waived as to the acquittal of any higher grades of crime included in the indictment would clearly seem to subject the accused to double jeopardy without his consent and so to violate any provision against such double jeopardy. While the effect of this decision will undoubtedly be to do away with many appeals on petty grounds, it will also tend to discourage those that are *bona fide*.

ELEVATORS — OPERATORS AS CARRIERS — DEGREE OF CARE. — The plaintiff, an employee of a tenant of the defendant, was injured by the falling of an elevator which the defendant maintained and operated, and brought action for damages. At the trial the judge refused to instruct that the defendant was not liable if he had used reasonable care and prudence in the construction, maintenance, and operation of the elevator. *Held*, that it was error to refuse such an instruction. *Edwards v. Manufacturer's Bldg. Co.*, 61 Atl. Rep. 646 (R. I.).

It is universally held that a common carrier must exercise a high degree of care. *Readhead v. The Midland Ry. Co.*, L. R. 2 Q. B. 412. An operator of an elevator is not a common carrier in the strict legal sense of the term. *Seaver v. Bradley*, 179 Mass. 329. But the overwhelming weight of authority is that he owes the same degree of care as a common carrier. *Treadwell v. Whittier*, 80 Cal. 574; *contra*, *Griffin v. Manice*, 166 N. Y. 188. The argument in the

case under discussion is that common carriers must exercise great care because of the peculiar business in which they are engaged, but that the care required of elevator operators should be only that which is due to persons on premises by implied invitation. But the idea running through all the cases of common carriers and elevators alike is that public policy demands a high degree of care where so many lives are exposed to danger. *The Philadelphia, etc., Rd. Co. v. Derby*, 14 How. (U. S.) 468, 486; *Springer v. Ford*, 189 Ill. 430. The force of this argument makes the decision of the lower court seem preferable.

EQUITY — INJUNCTION — CONTRACT IN RESTRAINT OF TRADE. — Certain insurance companies entered into an agreement the object of which was to regulate the rates of insurance. The Attorney General sought, in behalf of the public, to restrain them from carrying out the agreement. *Held*, that in the absence of a statute authorizing the Attorney General to bring the complaint, the bill must be dismissed, although the contract was contrary to public policy being in restraint of trade. *McCarter, Atty. Gen. v. Firemen's Ins. Co.*, 61 Atl. Rep. 705 (N. J., Ch.).

In New Jersey there is no statute prohibiting contracts in restraint of trade. Nor do such contracts appear to be positively illegal, though they are not enforceable at the instance of either party. *Cf. Albright v. Teas*, 10 Stew. (N. J.) 171. It is true that equity, in many cases, has enjoined a clear violation of the rights of the public at the instance of the Attorney General, although he had no express authority by statute to bring the bill. *In re Debs*, 158 U. S. 564; *Attorney-General v. Hunter*, 1 Dev. Eq. (N. C.) 12. But in general, if the plaintiff's right or the defendant's wrong is doubtful, a permanent injunction will not issue. *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296. In New Jersey, at least, the defendant's wrong seems doubtful; it lies entirely within the discretion of the court to determine whether it is too doubtful to warrant the issue of an injunction.

EQUITY — RESCISSION OF CONTRACT FOR MUTUAL MISTAKE OF FACT. — The defendant employed a real estate broker to sell for him property on a certain avenue. The broker pointed out to the plaintiff houses on another avenue as the ones for sale, and after inspection the plaintiff signed a contract calling for the purchase of the first-named property. *Held*, that because of the broker's misrepresentations, whether honest or not, the plaintiff can have the contract cancelled. *Silverman v. Minsky*, 109 N. Y. App. Div. 1. See NOTES, p. 290.

EVIDENCE — DECLARATION IN COURSE OF DUTY — ORAL STATEMENT OF DECEASED PHYSICIAN TO PATIENT. — In a suit by a husband for the dissolution of marriage, the wife made counter-charges of cruelty. In order to show the cause of an illness which she wished to prove her husband had been responsible for, she offered in evidence a statement made to her during her illness by the attending physician, who had since died. *Held*, that the evidence is inadmissible. *Dawson v. Dawson*, 22 T. L. R. 52 (Eng., Prob., Divorce & Adm., Nov. 10, 1905).

Written statements of a deceased person made in the ordinary course of his duty are everywhere admissible in evidence. 2 WIGMORE, EVIDENCE, § 1518. Oral statements were said by Lord Campbell to be included in this exception to the hearsay rule. *Sussex Peerage Case*, 11 Cl. & Fin. *85, *113. His remark, though not necessary to the decision, has been followed by the English judges. *Reg. v. Buckley*, 13 Cox C. C. 293. The present case seems opposed to *Reg. v. Buckley*, though it may perhaps be reconciled with it on the ground that a physician frequently refrains from telling his patients the truth about their condition, and that therefore statements made under such circumstances are not so trustworthy as those made under a positive duty to tell the truth. The two cases are otherwise in conflict, however, and the present one may mark the return of the English courts to their old rule. The law on the point in this country is not settled, but shows little tendency to accept the doctrine of *Reg. v. Buckley*. *Cf. Williams v. Walton and Whann Co.*, 9 Houst. (Del.) 322, 9 HARV. L. REV. 288. At least one case reaches the result of *Reg. v. Buckley*,

by calling the statements of a physician as to the illness of his patient a part of the *res gestæ*. *McNair v. National Life Ins. Co.*, 13 Hun (N. Y.) 144.

EVIDENCE — HEARSAY — AGE OF WITNESS. — On a trial for statutory rape, the age of the prosecutrix being in issue, objection was made to her competency to prove her own age, on the ground that her knowledge of it was obtained outside of her family, though from a person (B) with whom she had lived as an orphan. *Held*, that the evidence is not admissible. *People v. Colbath*, 104 N. W. Rep. 633 (Mich.).

Though the statement may not be in regard to pedigree, and, strictly speaking, is hearsay, the broad view is usually taken that as the statement of a witness regarding his own age is sufficient in practical affairs of life, it should be admissible. *Cheever v. Congdon*, 34 Mich. 296. And it will be admitted though his parent is present, and though it appears that his knowledge came from the parent. *Loose v. State*, 120 Wis. 115. But the statement of B herself as to the age of a person not a member of her family would not have been admissible. *Simpson v. State*, 81 S. W. Rep. 320; see 9 HARV. L. REV. 486. And it follows as a logical step from this rule, that the fact of passing through one more individual, though that one happens to be the person whose age is in question, should not make that admissible which was before inadmissible. *Cf. State v. Congot*, 121 Mo. 458. If the contrary view were taken, it would follow that the rule limiting evidential statements of age to members of the family of the person whose age is in question should be extended to include those who would be likely to know, irrespective of relationship. This would of course be an extension with vague limits, but might be wise in the case of an orphan entirely without family, or where none of the family knew.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENTS BETWEEN OFFICE-HOLDERS AS TO TERMS OF OFFICE. — At the first election after the death of one alderman of a board of eight (four of whom were elected annually for a term of two years), five were chosen with no specification as to which should have the short term. The question could not be settled by the three aldermen whose terms were not in dispute, since they did not constitute the necessary quorum. One of the new members agreed to take the short term on condition that the others vote for him for president of the board. Elected president, at the end of the year he refused to withdraw. *Held*, that the contract is not contrary to public policy and that the defendant may be compelled to resign. *Hobbs v. Upington*, 89 S. W. Rep. 128 (Ky.).

The position of the court in enforcing such a contract must be regarded as extremely questionable. The defendant induced his colleagues to vote for him for president of the board by promising them an undisputed two-year term. If he had offered money for the same purpose, the agreement clearly would have been void as against public policy. *Swayze v. Hull*, 8 N. J. Law 54. Similarly, his colleagues induced him to promise to withdraw at the end of the year, by agreeing to vote for him for president. Here again, if they had offered money to procure his withdrawal, the agreement would have been contrary to public policy. *Eddy v. Capron*, 4 R. I. 394. The fact that the consideration on each side was political office instead of money does not alter the principles involved. See *Stroud v. Smith*, 4 Houst. (Del.) 448. When the substance of a contract is the bartering of public offices for private and unworthy motives, no equitable ground for its specific enforcement can be found.

INSURANCE — RIGHTS OF INSURER — EFFECT OF INSURED'S GRANTING ABATEMENT IN PRICE TO VENDEE. — The defendant agreed to sell to the Corporation of Plymouth certain premises which had been insured by the plaintiff. Before the title was transferred, some buildings were burned; and the insurance was collected by the defendant. Thereafter the defendant released to the Corporation of Plymouth his claim for an amount of the purchase price equivalent to the amount of the insurance money. The plaintiff sued the defendant to obtain the value of this right that was released. *Held*, that it can recover. *Phoenix Assurance Company v. Spooner*, [1905] 2 K. B. 753.

Having decided that the vendee of premises that had been burned before the transfer of title has no right to the insurance money which the vendor receives, the English courts were confronted with the alternative of allowing the vendor to recover double compensation for his loss, or of subrogating the insurance company to the vendor's rights against the vendee. *Cf. Rayner v. Preston*, 18 Ch. D. 1. The latter alternative was chosen, and the present case merely reinforces that decision. *Cf. Castellain v. Preston*, 11 Q. B. D. 380. The courts of this country feeling that the insurance money really stands in the place of the destroyed property, have held that, like the property which it represents, such money belongs in justice to the vendee. *Skinner, etc., City v. Houghton*, 92 Md. 68, 82. This view is a departure from the doctrine, which has found favor in England, that a policy of insurance is a contract of personal indemnity. But the American position is justified on equitable grounds, since it places the loss upon the insurance company which has been paid to sustain it, and relieves the vendee from the necessity of paying for what he does not receive.

MORTGAGES — MERGER OF INTERESTS — TRANSFER OF DEBENTURES AFTER PAYMENT. — A company issued debentures as a first charge on its property, agreeing to create no charges in priority to or upon an equal footing with them. Some of these debentures it issued to A, as security for a loan. Later the loan was paid off by the company, and the debentures returned by A, together with blank transfers. The company then, having applications for debentures, transferred these same debentures to the applicants, who paid their full value, and were registered as holders. At the winding up of the company, these transferees claimed equal priority with the other debenture holders. *Held*, that they are not entitled thereto, since their debentures were either extinguished by payment, or if kept alive could not be set up against the other debenture holders. *In re W. Taskers & Sons, Ltd.*, [1905] 2 Ch. 587.

When the owner of property subject to a mortgage acquires the mortgage, equity will prevent the extinction of the mortgage by merger, if an intention to keep it alive can be found, or, in the absence of evidence of intention, if it will be to the owner's advantage to keep it alive, provided it will not perpetrate a fraud on third parties. *Forbes v. Moffatt*, 18 Ves. Jun. 390. But since equity will not aid fraud, it has been held that when a mortgage debt is paid by one who is bound to pay it, and upon whom the burden of payment ought to fall, an assignment of it to him operates as a discharge. *Burnham v. Dorr*, 72 Me. 198; see also JONES, MORTGAGES, 5th ed., 864. Under this rule, a mortgagor who has acquired a first mortgage made by himself cannot set it up against a subsequent mortgage also made by himself. *Otter v. Vaux*, 6 De G. M. & G. 638. It would seem equally unfair to let him set it up against a contemporaneous mortgage made by himself. Even if the company, by registering the transfer, were estopped to deny the validity of the transferred debentures, the other debenture holders are not so estopped. *Mowatt v. Castle Steel and Iron Works Co.*, 34 Ch. D. 58.

NEGLIGENCE — DUTY OF CARE — DUTY CREATED BY MUNICIPAL ORDINANCE. — An ordinance regulated the manner of running street cars. *Held*, that a violation of the ordinance is negligence *per se*, and a person injured can bring a civil action based on the breach of the duty imposed by the ordinance. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107. See NOTES, p. 288.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — JUROR'S NOTES OF EVIDENCE. — During the trial of the defendant for murder, a juror for three weeks openly took notes of the testimony in aid of memory. *Held*, that this does not as a matter of law require the setting aside of the verdict. *Commonwealth v. Tucker*, 33 Banker and Tradesman 2555 (Mass., Sup. Ct., Nov. 28, 1905).

In the absence of statutes, which provide in several states that jurors may take notes of the evidence, some courts regard note-taking as an improper practice, whereas others consider it allowable or sometimes even commendable, whether in a civil or criminal action. *United States v. Davis*, 103 Fed. Rep.

457; *Cowles v. Hayes*, 71 N. C. 230; *Thomas v. State*, 90 Ga. 437. And in civil cases at least, some jurisdictions permit counsel to request the jurors to take notes of a particular fact or calculation, provided that too much time is not consumed thereby, though the jurors are not required to comply. *Tift v. Towns*, 63 Ga. 237; *contra, Indianapolis, etc., Rd. Co. v. Miller*, 71 Ill. 463. It seems established that even in a murder trial, the verdict will not be set aside unless the fact affirmatively appears that neither the defendant nor his counsel had knowledge of the note-taking, for consent to it is presumed from failure to object. *State v. Robinson*, 117 Mo. 619. From the facts in the principal case, the fair inference is that there was knowledge. But the case seems sound in the view that even if there were no knowledge, note-taking by a juror is not illegal, and that so far as it is misconduct, the court will grant a new trial at discretion and not as a matter of law. See *Commonwealth v. White*, 147 Mass. 76.

POWERS—EXECUTION BY RESIDUARY DEVISE.—A testator, having a special power of appointment, left a will which purported to dispose of all the property he owned or over which he had any power of disposition. The will did not mention the power, but contained a general residuary clause. *Held*, that the power is executed in favor of the residuary legatees who are members of the class specified by the donor of the power. *Stone v. Forbes*, 189 Mass. 163.

The old common law rule, in force in nearly all of the states unless changed by statute, is that a power of appointment is not exercised by a general residuary devise of all the testator's estate. A further intention to appoint must appear. *Hollister v. Shaw*, 46 Conn. 248. Massachusetts has departed from the rule in the case of general powers by holding that a residuary devise sufficiently indicates the intention to appoint. *Amory v. Meredith*, 7 Allen (Mass.) 397. An effort was made to distinguish the present case because it involves a special power. English decisions make such a distinction in construing the Wills Act. *In re Hayes*, [1900] 2 Ch. 332. The Massachusetts court says that as the intent to exercise the power is sufficiently expressed to satisfy the common law rule, they need not decide the point; but the opinion intimates that the special power would have been treated like a general one if the intent had not been found. North Carolina follows the Massachusetts decisions in a case involving a special power without mentioning the distinction. *Johnston v. Knight*, 117 N. C. 122. And Massachusetts will probably refuse to treat the two kinds of powers differently, as there is quite as much reason for holding that the testator intended the residuary legatee to be the appointee in one case as in the other.

PREFERENCES—AT COMMON LAW—EFFECT OF APPOINTMENT OF RECEIVER ON STATE PRIORITY.—A receiver was appointed for an insolvent corporation under a statute vesting him with title to its assets. *Held*, that this cut off the state's right to priority. *State v. Williams*, 61 Atl. Rep. 297 (Md.). See NOTES, p. 292.

PUBLIC OFFICERS—RESIGNATION—WITHDRAWAL OF RESIGNATION.—A justice of the peace filed his resignation to take effect in the future. It was at once accepted and notice was given the election commissioners to hold a new election. Later, but before the resignation was to take effect, it was attempted to be withdrawn without the consent of the accepting authority. *Held*, that the resignation was irrevocable. *Murray v. State ex rel. Luallen*, 89 S. W. Rep. 101 (Tenn.).

The common law doctrine, prevailing in a majority of the states, requires that a resignation to be effective must be accepted. *Fryer v. Norton*, 67 N. J. Law 537. By this view it is merely an offer, which may be withdrawn before acceptance. *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17. But when a resignation intended to operate at once has been accepted, withdrawal is impossible under any circumstances, for the office is vacant and can be filled only according to law. *State ex rel. Bergshicher v. Grace*, 113 Tenn. 9. A distinction, however, is taken with reference to prospective resignations. As

the incumbent is not out until the date set, there seems to be no objection to a withdrawal before then, even after acceptance, provided the accepting authority consents and no new interests, such as arrangements for an election, have intervened. See *Biddle v. Willard*, 10 Ind. 62. Since the present case falls foul of both these objections, it could scarcely be decided otherwise, but the court rests its judgment entirely on the previous Tennessee decision, cited above, relating to an immediately effective resignation. In states where a resignation is final without acceptance, withdrawal should be allowed in the case of prospective resignations at any time before the operative date, except where new rights have intervened. It has been so held. *State ex rel. Williams v. Beck*, 24 Nev. 92.

RES JUDICATA — MATTERS CONCLUDED — ASSIGNEE OF JUDGMENT AS A PRIVY TO GARNISHMENT PROCEEDINGS ON THE JUDGMENT. — A judgment creditor, W, assigned his judgment against H to the plaintiff in the present suit. Before assigning to the plaintiff, W had commenced an action against the defendant in the present action, as garnishee of H, the judgment debtor. The garnishment action failed, and in the present action the plaintiff maintains that a finding in the garnishment proceeding is *res judicata* as between himself and the defendant. Held, that the plaintiff was neither party nor privy to the proceedings in the garnishment action, and that the finding in it is therefore not *res judicata* in the present suit. *Allen v. Ellis*, 104 N. W. Rep. 739 (Wis.).

The general rule is that an assignee is privy to judgments rendered in suits on the chose assigned if the suits were begun before the assignment. *Corcoran v. Chesapeake, etc., Co.*, 94 U. S. 741. The question raised in this case was whether the garnishment action is intimately enough related to the original judgment to bind the assignee of the judgment. The garnishment proceeding was merely auxiliary to execution on the judgment assigned. *Garland v. McKittrick*, 52 Wis. 261. That the garnishment proceeding was not specifically assigned is of course not conclusive against its binding the assignee. *Block v. Commissioners*, 99 U. S. 686. Furthermore the fact that it was based on the judgment and might have involved a finding that the judgment was void seems to show its necessary connection with the judgment. *Beaupre v. Brigham*, 79 Wis. 436. An additional consideration pointing to this result is that the assignee would be entitled to the proceeds of the garnishment. *Bullitt & Fairthorne v. Methodist Episcopal Church*, 26 Pa. St. 108. The contrary view would seem to allow the assignee to bring a new garnishment action against the same garnishee, raising the same issues; and successive assignees would have indefinitely the same power of continual litigation. This is against the fundamental policy of the law of *res judicata*. Cf. *Bisland v. Griffin*, 9 La. An. 150.

RES JUDICATA — PERSONS CONCLUDED — CO-DEFENDANTS. — A decree in equity declared that C, one of two defendants, was entitled to a certain sum of money which the plaintiff A claimed as judgment-creditor of B, the other defendant. B now brings this action against C for the same sum. Held, that the decree operates as a bar to his right, on the principle of *res judicata*. *Ellis v. Cole*, 105 N. Y. App. Div. 48.

If A's claim against C is derived from and is as great as that of B against C, and if A fails to establish his case, then B is barred from asserting his claim against C in a subsequent suit. *Cohen v. Simpson*, 32 S. W. Rep. 59. In the case under discussion the decree in equity necessarily involved the decision that C was entitled to the money as against B; for otherwise A would have been entitled to it, since his claim was admitted to be as great as that of B. The provision in the Code (§ 521) requiring a defendant to notify his co-defendant when he wishes to establish his rights against such co-defendant as well as against the plaintiff, does not apply to cases where these rights are necessarily involved in a judgment for or against the plaintiff, since the Code provision was not intended to interfere with the principles of *res judicata*. *Pratt v. Johnston*, 59 N. Y. App. Div. 52.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — CHANGE IN CHARACTER OF LOCALITY AS GROUND FOR REFUSING INJUNCTION. — The de-

fendant was the owner of land subject to a covenant, limited in duration to twenty-five years, that there would not be built upon it "any tenement, apartment or community house." After nineteen years the neighborhood had ceased to be desirable for private residences, so that the enforcement of the covenant would cause great hardship to the defendant without benefit to the plaintiff's property. *Held*, that equity will not enjoin a threatened breach. *McClure v. Leaycraft*, 183 N. Y. 36.

The decision of the lower court, which is here reversed, was commented upon in 18 HARV. L. REV. 472.

RULE AGAINST PERPETUITIES — CY-PRÈS DOCTRINE. — The testator devised his freehold estate to A for life, remainder to A's eldest son for life, remainder to the first and other sons of A's eldest son in tail male successively, remainder to the other sons of A successively subject to the same limitations, remainder to the daughters of the first and other sons of A successively in tail as tenants in common, remainder to the daughters of A in tail as tenants in common, remainder to A, his heirs and assigns, forever. A died without ever having had issue. As the devises to the sons of A's sons were void for remoteness, the executors proposed to substitute the following limitations in order to effectuate the testator's intent: to A for life, remainder to A's sons successively in tail male; if on the determination of prior estates there shall be a failure of issue of the sons of A other than daughters or issue of daughters, then to A's sons successively in tail general; remainders thereafter as in the original will. *Held*, that the substitution be not accepted. *In re Mortimer*, [1905] 2 Ch. 502.

The doctrine of *cy-près*, which has been applied in order to mitigate the severity of the rule against perpetuities, aims to effectuate the intention of the testator. It will not be invoked if its application results in benefiting persons whom the testator did not intend to benefit; but it may be used even though the order in which the devisees take is thereby changed. See GRAY, RULE AGAINST PERP. §§ 647, 649. In order to give effect to the testator's intention in the present case an unusual condition transforming vested into contingent remainders was invented. Had the court been inclined to look with favor upon the doctrine, such an expedient would probably have been sanctioned. The decision, however, is in harmony with the disposition of the English court to restrict the doctrine of *cy-près*. *Cf. In re Richardson*, [1904] 1 Ch. 332.

STATUTES — INTERPRETATION — WHETHER APPOINTEE OF LEGISLATURE MAY EXTEND ITS POWER BEYOND EXACT WORDING OF STATUTE. — A statute gave the county courts of the state power, subject to a local option law, to grant liquor licenses to adults of good moral character. The plaintiff was granted a license by the county court of his county, with the provision that the license might be revoked by the same court if the plaintiff violated the local liquor laws. The plaintiff broke the Sunday law and the county court revoked his license. *Held*, that the plaintiff has no legal ground for complaint. One justice dissented. *Sarlo v. Pulaski County*, 88 S. W. Rep. 953 (Ark.).

A state legislature, under its police power, can control the sale of liquor within the state, and may properly delegate to subordinate bodies the right of local control. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657. It being admitted that the legislature in the present case might properly have given the county court power to grant revocable licenses, the question remains, did it in fact do so? *Cf. Schwuchow v. City of Chicago*, 68 Ill. 444. The courts, in interpreting a statute, usually assume, in the absence of a strong reason for a contrary holding, that the legislature intended to reserve what it did not grant. *Lantz v. Hightstown*, 46 N. J. Law. 102. The present decision, however, asserts that power to grant to proper persons includes power to revoke. The only case on this precise point is in accord. *Gerstlaner's License*, 5 Pa. Dist. Reps. 97. The view of the dissenting justice, that until power is expressly, or by necessary implication granted, the court should not assume it to have been granted, seems to conform more closely to the general current of statutory interpretation. The suggestion that the welfare of the community demands the broader construction is not controlling, inasmuch as another

statute gives municipal corporations the power to regulate liquor-selling. For a discussion of another phase of the same general subject, see 19 HARV. L. REV. 203.

TAXATION — STATE AGENCY — TAXATION BY FEDERAL GOVERNMENT. — The State of South Carolina, in its efforts to regulate the liquor traffic, established a dispensary system, and prohibited the sale of liquor by any but its own officers. Under its internal revenue system, the United States imposed upon the dispensers a license tax, from which the State claimed exemption, on the ground that the dispensary system was a means employed by it in the execution of its police power. *Held*, that the tax is valid. *State of South Carolina v. United States*, U. S. Sup. Ct., Dec. 4, 1905. See NOTES, p. 286.

THEATRES AND AMUSEMENTS — TICKETS OF ADMISSION — RIGHTS OF HOLDER. — The plaintiff, a licensed ticket speculator, bought theatre tickets of the defendant on which was a printed statement that, if they were sold on the sidewalk, they would be rejected at the door. While the plaintiff was attempting to sell on the sidewalk, agents of the defendant warned prospective purchasers not to buy. The plaintiff brought a bill to restrain the defendant from interfering with his business. *Held*, that the bill be denied, as no right of the plaintiff is being infringed since the express condition of the contract of purchase invalidated the ticket if sold on the sidewalk. *Collister v. Hayman*, 34 N. Y. L. J. 871 (N. Y., Ct. App., Dec. 5, 1905).

For a discussion of the principles involved, see 14 HARV. L. REV. 455.

TRESPASS TO REALTY — WHO MAY SUE — MORTGAGEE WITH RIGHT OF ENTRY AT TIME OF TRESPASS. — *Held*, that after entry by a mortgagee of land his possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry. *Ocean Accident, etc., Corporation v. Ilford Gas Co.*, [1905] 2 K. B. 493.

The old doctrine allowing a disseisee on re-entry to sue for trespasses committed during his dispossession has been given a broader scope in a case holding that the possession of an heir relates back to the time his right of entry accrued. *Litchfield v. Ready*, 5 Exch. Rep. 939; *Barnett v. Earl of Guildford*, 11 Exch. Rep. 19. The only difficulty of the present case lies in the fact that here the plaintiff does not have the full and unincumbered legal title; but since possession is the essential point in trespass, and the plaintiff had here a legal right to enter and take possession at the time of the trespass, the case seems to fall within the spirit of, as well as within the doctrine laid down in, the former decision. See *Anderson v. Radcliffe and Walker*, E. B. & E. 806. Several American cases are based on the even broader rule that recovery may be had when the mortgagor has not yet entered, providing only that his right of entry dates back to the time of the trespass. *Harris v. Haynes*, 34 Vt. 220. If this is a departure from the original conception of trespass, it seems desirable as promoting justice and avoiding the technical distinction between case and trespass.

TRUSTS — CESTUI'S INTEREST IN THE RES — CESTUI'S RIGHT TO BRING ACTION FOR DAMAGES TO REALTY. — In a division of land between A and B, certain lots were set apart to A, the legal title to which remained in B as trustee. The defendant constructed an embankment in front of and parallel to these lots, impeding ingress and egress to and from the highway and damaging the saleable value of the lots. In an action for damages brought by A, the defendant demurred. *Held*, that A himself may maintain the action. *Yates v. Big Sandy Ry. Co.*, 89 S. W. Rep. 108 (Ky.).

A *cestui que trust*, though the absolute owner in equity, is regarded at law as a mere stranger. PERKY, TRUSTS, 5th ed., § 328. If he is in possession, doubtless he, like any other possessor, may have trespass for an entry by a wrongdoer. *Stearns v. Palmer*, 10 Met. (Mass.) 32. But except in the rare instances where it is presumed that the legal title has been surrendered to the *cestui*, he cannot maintain ejectment. *Langdon v. Sherwood*, 124 U. S. 74;

see *Den v. Bordine*, 20 N. J. Law 394. Neither can he bring an action for damages to realty held in trust. *Davis v. Charles River Co.*, 11 Cush. (Mass.) 506. Where a plaintiff held real estate under a contract of purchase, on which all payments had been made, so as to entitle him to a deed, in an action for damages to the land, the court, though recognizing the necessity of joining the legal owner, allowed the *cestui* to recover on the ground that the defendant had failed to object at the proper time. *F., E. & M. V. R. Co. v. Setright*, 34 Neb. 253. But the principal case, which is not rested by the court on any statute, seems to go farther than any other. It disregards the true nature of the trust relation in suggesting that the rights of the *cestui* are here analogous to those of a lessee.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY OF TRUSTEE ACTING UNDER ADVICE OF COUNSEL. — A joint stock company acting as trustee paid under legal advice part of the trust funds to the wrong parties. Held, that the trustee is personally liable. *National Trustees, etc., Co. v. General Finance, etc., Co.*, 54 W. R. 1 (Eng., Privy Council, May 16, 1905).

A trustee must use such care in the management of the trust fund as men of ordinary prudence use in their own affairs. That a trustee has taken the advice of counsel is strong evidence of such prudence. *Neff's Appeal*, 57 Pa. St. 91. But in the distribution of the trust estate, a stricter liability is enforced. Where a trustee makes a payment to a person not authorized, he is liable personally for the misapplication; and this liability will follow, even though he acted in good faith and under the advice of counsel. *Doyle v. Blake*, 2 Sch. & Lef. 231, 243; *Owings v. Rhodes*, 65 Md. 408. In the latter event, however, it seems that the court will not impose costs on the trustee. *Angier v. Stannard*, 3 Myl. & K. 566. Where payment should be made according to the law of a foreign country, a trustee is not liable for a mistake as to that law unless the provision is called to his notice. *Leslie v. Baillie*, 2 Y. & C. C. C. 91. The apparent stringency of the general rule is relieved by the fact that a trustee may, in case of doubt, refuse to distribute the trust fund without the sanction of the court. *Re Wylly's Trusts*, 28 Beav. 458.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: RIPARIAN RIGHTS — EXTINGUISHMENT OF RIPARIAN RIGHTS. — *Semble*, that a transfer of a right to water in a stream is a transfer of real property within the Statute of Frauds, but such transfer, though by parol, is excepted from the statute by equity when there has been part performance under an agreement to give a license to divert. *Churchill v. Russell*, 82 Pac. Rep. 440 (Cal.). See NOTES, p. 293.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE RELATION OF CUSTOM TO LAW. — The retrospective operation of judicial decisions in affecting rights which have accrued prior to their adoption has been explained by various theories. The early English judges, holding themselves incompetent to add to the common law, decided new questions of law that arose concerning past transactions, under the pretense of following precedents which did not in fact exist. In modern times judges have explained this effect of their decisions by the doctrine that judges do not make the law, but merely interpret a body of rules already existing independently of their decision. Upon either of these assumptions the court merely applies a pre-existing rule, however novel the question presented for its judgment. This retrospective effect of a decision and the theories by which it is sought to be explained furnish plausible grounds for the doctrine that customs which have

become embodied in the common law were law before they were adopted by the courts. In a recent article concerning the judicial enforcement of custom the notion that judges are incompetent to add to the law is condemned as a fiction. *Customary Law in Modern England*, by W. Jethro Brown, 5 Columbia L. Rev. 561 (Dec., 1905).

The writer's discussion deals with two questions: at what stage does custom become law, and from what source does it derive its binding force? Custom, the author maintains, amounts only to "a highly persuasive, rather than a legally binding, source of rules." A given custom does not become a rule of law until it has been adopted by judicial decision, and the courts are bound to enforce it. Support for these contentions is sought in "the fact that courts never enforce custom as such, but only enforce custom as satisfying certain tests which the courts themselves have imposed." Particular customs, in order to be enforced, must be reasonable, certain, and immemorial; and even general customs must be reasonable in order to receive the judicial sanction which makes them law. The writer draws a distinction between the conditions under which customs and precedents are given effect by the courts. A precedent binds "unless obviously unreasonable, whilst a custom must be proved positively to be reasonable and in accord with public convenience." The second question as to the source of the binding force of custom is answered by saying that judges are bound to adopt a custom which satisfies the required tests, "not by virtue of any inherent authority of custom, but by virtue of their own practice." The reason why a custom satisfying these tests is law, is simply because "the judges treat it as such," when they sanction it by a decision.

The writer's discussion raises fundamental questions as to the nature of law which divide the historical and analytical schools of jurisprudence. According to the doctrines of the former school, not only is custom law, before it receives any judicial sanction, but it possesses a binding force independently of enforcement by courts and by an inherent and ultimate authority of its own. The analytical jurists, while agreeing that custom derives its authority as law from the sanction of the courts, disagree as to the precise period when custom satisfies the requirements of the definition of law. According to Austin a custom is transmuted into law only when it is adopted as such by a court of justice and the decision is enforced by the power of the state. AUSTIN, JURISPRUDENCE, 4th ed., 104. Holland, however, lays it down that a custom becomes law as soon as it satisfies specified tests, though it has not yet been adopted in any judicial decision; a custom, when it fulfils these requirements, is law by virtue of a "tacit law of the state giving to such customs the effect of laws." HOLLAND, JURISPRUDENCE, 9th ed., 59. The language of Holland's statement seems to involve an argument in a circle. Mr. Brown's view that custom derives its authority from the practice of courts in enforcing it, seems to describe more accurately the facts of our judicial system. And his contention that custom in order to become law must first be sanctioned by judicial decision, is supported by the language of the modern English decisions. See *Brandao v. Barnett*, 12 Cl. & F. 787, 805; *Goodwin v. Roberts*, L. R. 10 Exch. 346, 352, 357. A similar opinion is expressed in several American decisions. See *Consequa v. Willings*, Pet. (U. S. C. C.) 225, 230; *Bonham v. Charlotte, etc., R. R. Co.*, 13 S. C. 267, 276.

DISSENTING OPINIONS. — For half a century there has been scattering discussion of the wisdom of dissenting opinions in courts of last resort. No one has attempted to assert that uniform agreement among judges is possible so long as judges are human; the question has been as to the propriety of the publication of their disagreements. The chief arguments against any expression of dissent are its powerlessness to affect the decision of the case, its detraction from the prestige of the impersonal court, and its effect in keeping the law unsettled. The first is probably disposed of by the consideration that the reasons of the court are stated not so much for the benefit of the litigants

as for the assistance of future judges in passing on identical or similar states of fact. The second is a real objection if true, but it is doubtful if the dignified statement of universally suspected differences of opinion does not rather inspire confidence in the independence of the judges. The third objection is put with great force in a recent article. *Dissenting Opinions*, by William A. Bowen, 17 Green Bag 690 (Dec., 1905).

The author's main thesis is that certainty is more important than justice in the law. To gain it he would have courts speak with but one unwavering voice, however divided in the council-chamber the judges may be. Undoubtedly the law would, in a sense, become more settled by such a course. But many advocates of dissenting opinions are willing to have the law temporarily unsettled by a cogent dissent, since they do not admit the total undesirability of such a condition. So long as courts are permitted to reverse their own decisions the law will never be definitely fixed. Moreover, as the law is not composed of unrelated rules, it will always be found that parts out of harmony with the whole will require alteration to avoid contradictions. For these reasons a writer on the other side prefers uncertainty in the law until it can be settled rightly. See *Dissenting Opinions*, by V. H. Roberts, 39 Am. L. Rev. 23. Mr. Roberts points out that dissenting opinions have often served as the basis for correction of unwise decisions, or, where such decisions have not been overruled, have limited their further extension. So too, another writer has paid high tribute to many of the dissenting opinions on constitutional questions of the Supreme Court Justices, while deprecating ordinary dissent. See *Great Dissenting Opinions*, by Hampton L. Carson, 50 Alb. L. J. 120. Mr. Carson outlines the sensible influence of these opinions upon the development of constitutional construction. As against this, the writer of the present article maintains the extreme position that the injuriousness of a dissenting opinion is in direct proportion to its strength and to the importance of the case. The chief fallacy of the article lies in the author's failure to distinguish between the results of unavoidable differences of opinion and the results of the expression of such differences.

Most of us, however, will agree with the writer's strictures on the abuses of the privilege. A large part of the criticism to which it has been subjected is not due to a fundamental weakness, but to the tendency of minority judges to travel out of the law into a discussion of moral, social, and political questions which they think the decision of the court will precipitate. Of course, dissent which is hair-splitting or on questions of fact is always objectionable. If judges would dissent only when they believed their brethren to be seriously mistaken, and would confine themselves to a dignified exposition of the exact point of difference on the law, the abolitionist camp would lose much of its ammunition.

LIFE SALVAGE.—While strongly commending the general consistency of the law of salvage, Mr. Frederic Cunningham, in a recent article, finds in it one strange anomaly, in regard to the law of life salvage. *Life Salvage*, 17 Green Bag 708 (Dec., 1905). If the passengers of a ship are rescued without saving the ship itself, no compensation can be recovered either from the passengers or from the owner of the vessel. *The George W. Clyde*, 80 Fed. Rep. 157. On the other hand, if passengers and ship are both saved, the owner of the vessel must pay a greater amount of salvage than the mere rescue of the ship would entail. *The Bremen*, 111 Fed. Rep. 228.

Mr. Cunningham fully appreciates the desirability of giving even greater encouragement to the rescue of life at sea than is offered for the saving of property, but protests with manifest reason against compelling the ship-owner to furnish that encouragement when he derives no substantial benefit in return. Such an objection, of course, could not be urged where the saving of life frees the ship-owner from liabilities in damages which would otherwise be incurred. As a solution of the difficulty, the writer suggests the passage of a United States statute, allowing the salvor to recover against the person whose life he

has saved. In England, since the Merchant Shipping Act of 1854, the matter has been regulated by a statute which authorizes the Board of Trade in its discretion to pay life salvage out of the Mercantile Marine Fund, in the event of the ship's being entirely lost or its value insufficient to meet the claims. The writer would apparently favor recourse to some such general fund only as an alternative, where the person saved is unable to pay, and suggests that Mr. Carnegie's Peace Hero Fund would be well applied to such a purpose.

The writer's objections to the present status of life salvage in our maritime law are obviously well reasoned, but issue may be taken on the remedy suggested. To say that he who in effect has created property by saving it, shall be entitled to a portion of that property, seems to be no distortion of general legal principles. The right is in the nature of a lien, and the remedy is pursued by a proceeding *in rem* against the property itself. *The Sabine*, 101 U. S. 384. Such reasoning, however, reduces itself to an absurdity when applied to the saving of human life. Here the remedy must be sought by an action *in personam*, and the anomalous doctrine of compulsory rewards could scarcely find a place for itself among common law principles. As suggested by the writer's allusion to the Carnegie Hero Fund, the appeal is to philanthropy rather than to law. A feasible solution of the problem, however, would be the statutory establishment of a fund similar to the English Mercantile Marine Fund, but which would free the ship-owner from all obligations for life salvage, except in cases where he would have been liable in damages to the passengers because of negligence.

ACTIONS BY UNBORN INFANT. *James M. Kerr*. Maintaining that an infant should be allowed to recover for damages to its person while *en ventre sa mere*. 61 Cent. L. J. 364.

CONSTITUTIONALITY OF THE INDIANA ANTI-CIGARETTE LAW, THE. *Thomas A. Sims*. Discussing the law's effect on infra-state traffic and importation into the state. 4 Mich. L. Rev. 124. See 18 HARV. L. REV. 530.

CUSTOMARY LAW IN MODERN ENGLAND. *W. Jethro Brown*. 5 Columbia L. Rev. 561. See *supra*.

DANGEROUS POSITION FOR THE RAILROADS, A. *David Walter Brown*. Maintaining that since the power to regulate railroad rates is not prohibited absolutely by the Constitution, the railroads, by denying that it is in Congress, "throw down the bars" to state regulation. 5 Col. L. Rev. 600.

DISSENTING OPINIONS. *William A. Bowen*. 17 Green Bag 690. See *supra*.

DOCTRINE OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE AS DEFENSES TO ACTIONS FOR DAMAGE RESULTING FROM A FAILURE TO COMPLY WITH EXPRESS STATUTORY PROVISIONS, THE. *M. C. Freerks*. Containing a statement of the authorities. 61 Cent. L. J. 446.

EXPERT TESTIMONY FROM THE STANDPOINT OF THE WITNESS. *Albert S. Osborn*. Suggesting, as a cure for present evils, that qualified expert witnesses be appointed for definite terms by the higher state courts. 67 Alb. L. J. 330.

FEDERAL CONTROL OF INSURANCE. *Andrew Alexander Bruce*. Criticising the Report of Committee on Insurance Law, presented at the last meeting of the American Bar Association, and objecting to the centralization of such power in the federal government. 61 Cent. L. J. 384. See 19 HARV. L. REV. 142.

GOVERNMENTAL REGULATION OF RAILROAD RATES. *George R. Peck*. Arguing that Congress cannot delegate to any other body the power of fixing railroad rates *in futuro*, as it is a legislative function. 13 Am. Law. 485.

IDENTIFICATION AND INDORSEMENT. *Anon.* Showing that a bank has a legal right to require identification of payee or a guaranty before payment; also contending that a bank has a legal right to require payee to endorse. 22 Bank. L. J. 847.

INTERNATIONAL LAW UNDER QUEEN ELIZABETH. *Edward P. Cheyney*. 20 Eng. Hist. Rev. 659.

JURISDICTION OF FEDERAL COURTS IN ACTIONS IN WHICH CORPORATIONS ARE PARTIES. *Jacob Trieber*. 13 Am. Law. 477.

LAW OF BANK CHECKS, PRACTICAL SERIES ON THE. IV. NEGOTIATION. *Anon.* Discussing rights of payee against drawer when check is negotiated by a third party; negotiation by agent, trustee, or customer. 22 Banking L. J. 831.

LIFE SALVAGE. *Frederic Cunningham*. 17 Green Bag 708. See *supra*.

- LIMITATIONS UPON THE POWER OF ONE STATE TO EXCLUDE THE CORPORATIONS OF ANOTHER. *Eugene F. Ware*. 17 Green Bag 699. See NOTES, p. 291.
- OBLIGATION OF CONTRACT IN ITS RELATION TO THE U. S. CONSTITUTION. *Theodore F. C. Demarest*. Discussing U. S. Const., Art. I. sec. 10, as a ground for the decision in *Muhler v. New York*, etc., R. R. Co., 197 U. S. 544. 67 Alb. L. J. 315.
- PACIFIC ISLAND LABORERS ACT, 1901 (No. 16 of 1901). *B. A. Ross*. Questioning the right of a country to deport laborers. 3 Commonwealth L. Rev. 3.
- POSITION OF A TRUSTEE IN BANKRUPTCY WITH REFERENCE TO INVALID TRANSFERS OR LIENS, THE. *Ellicott D. Curtis*. 5 Columbia L. Rev. 584.
- REMARKS UPON CHARGING THE JURY IN A TRIAL FOR MURDER, SOME. *Robert Ralston*. Read before Pennsylvania Bar Association, 1905. 53 Am. L. Reg. 658.
- STATUTE OF USES AND THE MODERN DEED, THE. *John R. Rood*. 4 Mich. L. Rev. 109.
- STATUTES REGULATING MEDICAL PRACTICE. *Lewis Hochheimer*. Collecting the cases that discuss what constitutes the practice of medicine. 61 Cent. L. J. 424.
- WAR, ARBITRATION, AND PEACE. *W. P. Rogers*. Advocating international arbitration. 4 Mich. L. Rev. 91.
- WAR IN THE ORIENT IN THE LIGHT OF INTERNATIONAL LAW, THE. *Theodore J. Grayson*. Discussing various novel questions in international law brought up by the recent war. 53 Am. L. Reg. 672.

II. BOOK REVIEWS.

THE LAW OF CONTRACTS. By William Herbert Page. In three volumes. Cincinnati: The W. H. Anderson Company. 1905. pp. ccclxv, 1-848; 851-1930; 1933-3083. 8vo.

This work is a disappointment. It is of value, but it falls far short of what it might have been. It is neither a first-class digest nor a first-class treatise. Neither does it satisfactorily collect the cases under appropriate sections, nor does it discuss principles so as to throw real light on the matter in hand. Of historical investigation it shows little or none. It is simply another bulky treatise which deals with its subject in an uncritical way, retaining many old fallacies and, it is to be feared, giving succor to more than one that is new. On the other hand it must be given credit for rejecting many common errors and for having cited, though often without careful discrimination, most of the recent cases on the subject. It is only proper that these criticisms should be supported by some reference to the work itself.

In § 274 the common definition of consideration as "a benefit to the promisor, or a detriment to the promisee" is adopted. While this definition persists in the books, it is certain that the number of cases in which a benefit to the promisor has been *held* sufficient are few indeed. Of those that Professor Page cites, not one is a decision in point. Referred to in one of the cases cited by him, however, is a decision (*Burruss v. Smith*, 75 Ga. 710) which might be thought to be in point. But why was not *Scotson v. Pegg* (6 H. & N. 295) included among the references? It is a leading case. The court go expressly upon the notion that a benefit is sufficient and it is only by adopting their argument that the case can be made to square with the ordinary statement that doing or promising what you are already bound to do is not a consideration. And other cases similar to *Scotson v. Pegg* could have been added. Williston, *Cases on Contracts*, I, 248. Professor Langdell (*Summary of Contracts*, § 64) long since pointed out that benefit to the promisor, while necessary to create a common-law debt, is neither necessary nor sufficient to make a promise binding. Indeed, to create a debt a detriment also is required, so that even there benefit though necessary is not a sufficient consideration. Most writers on contracts have agreed with Professor Langdell. Pollock, 6th ed., 164; Anson, *Huffcut's* ed., 88; Harriman, 1st ed., 56-7; Ames, 2 HARV. L. REV. I; Williston, 8 *ibid.* 33; Holmes, *Com. Law*, 290. Every case, and they are numerous in America (*Williston, Cases on Contracts*, I, 252, note), holding that a promise

to a *new* party to do what you are already bound to do is not a consideration is an authority against Professor Page's statement. One is constrained to think that he has not familiarized himself with either the best discussions of the matter or with the cases really bearing on it.

In § 276 it is stated that a consideration *from A* will support a promise *to B*. This must be considered an open question on the authorities. But only one or two of Mr. Page's citations bear on the question. Some of them are cases permitting beneficiaries to sue. These might have been multiplied almost indefinitely. That they have nothing to do with the question was clearly pointed out by Professor Williston in 15 HARV. L. REV. 771. Indeed, Professor Page recognizes this himself, Vol. I, p. 408. Professor Williston, at the place just cited, collects other cases bearing upon the question. These, one excepted, are not noted in the present work. The cases cited on page 409 as *contra*, with the exception of *Thomas v. Thomas* (2 Q. B. 851), have no bearing on the present question.

In § 578 we find the statement that "a written contract which is not required by law to be proved by writing, or to be in writing, is of no effect unless it is delivered, unless there is a valid oral contract between the parties, intended by the parties to be effective before delivery." What does this mean? Probably simply that the oral contract is valid. Do all written contracts then require delivery? This is not usually stated as one of the requisites of a simple contract. Of the cases cited by Mr. Page it may be said that in two of them the parties evidently made delivery a condition precedent to the contract taking effect, one was the case of a note and mortgage obviously distinguishable, one held that preliminary negotiations were merged in a written contract, and the other was at most but the uncommunicated offer of a note or due-bill in satisfaction of a precedent debt. In Professor Lawson's article on Contracts in 9 Cyc. 302, one will find several more cases stating that delivery is necessary. But on examination it appears that these statements were not required for the decisions and that they were made without any real consideration of the question. There is one sort of case that tests the matter. Suppose the parties to have put their agreement into writing and to have intended it to take effect as a contract, but that there has been no delivery. Would it be decided that there was no contract? The writer has not seen a case so holding. But *Brogden v. Metropolitan Ry. Co.* (2 App. Cas. 666) and *Amer. Pub. Co. v. Walker* (87 Mo. App. 503) seem to require the contrary view. See also *Mildren v. Steel Co.*, 90 Pa. St. 317. It should be added that memoranda to satisfy the Statute of Frauds do not require delivery. 29 A. & E. Ency. Law 855-6; Clark, *Contracts*, 2d ed., 91.

If space permitted, much more evidence of a similar character could be produced. One is surprised to find *Xenos v. Wickham* cited (p. 64) for the view that a sealed *offer* is irrevocable. *McMillan v. Ames* (33 Minn. 257), the only other authority cited on the point, is also a case of a covenant, not an offer. In § 1256 we are told that, when the assignee was permitted to sue at law in the assignor's name, the rule that choses in action could not be assigned at law degenerated into a mere rule of pleading. This seems misleading. The truth is that the assignee's substantive rights remained the same as before. The change was merely one as to the forum in which they were to be enforced. Now he could sue at law in his assignor's name instead of seeking a court of equity. But his right was still an equitable one for all other purposes. For example, if the debtor paid the assignor without notice of the assignment he was still protected. That could not be if by the change the assignment became effective to pass the legal title to the chose. Then the assignee would be in the position of the transferee of a negotiable instrument. Payment to a prior holder would not affect him. In § 1258 we are told that now choses in action may be assigned as well at common law as in equity and that this is largely due to statute. The statutes Professor Page refers to merely permit the assignee to sue in his own name. They do not change his substantial rights. Do they make choses in action assignable at law? Not at all. They simply affect a rule of procedure. Finally the whole discussion of beneficiaries is

surely capable of improvement in the light of Professor Williston's article in 15 HARV. L. REV. 767.

On the other hand, as has already been said, many common errors are avoided. The usual statement that a seal creates a presumption of consideration is properly discarded (§ 561). Contracts implied in fact are distinguished from quasi-contracts (§ 771). The difference between failure of consideration, in the sense of breach by the plaintiff, and lack of consideration is clearly indicated (§ 274). Mistake as to parties or terms of the contract which may prevent its creation, and mistake as to other matters which at most may render it voidable, are well discriminated (§ 60). These instances might be multiplied. Many matters are capitally explained. The adding of duplicate citations to unofficial reports is commendable. No doubt the work will prove useful. C. B. W.

JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES. By Hannis Taylor. Rochester: The Lawyer's Co-operative Publishing Company. 1905. pp. lxvi, 1007. 8vo.

The publication of a text-book of over a thousand pages, dealing solely with the jurisdiction and procedure of the United States Supreme Court, marks an epoch in the literature on this subject. Practice in the Supreme Court has been dealt with at some length in a volume by Heber J. May, Esq., published by John Byrne and Company in 1899; but this volume was more like a volume of annotated court rules than a well-rounded treatise. Aside from Mr. May's book, the text-book sources to which the practising lawyer had to go for light on the subject were the chapters in books on the general subject of Federal Procedure. There was therefore a distinct call for the present work.

Professor Taylor seems to have met this call with great success. He does not content himself, as do so many text-book writers of the day, with a mere statement of head-notes or extracts from opinions — although there are many passages, some of them quite long, from the opinions of the court. Such extracts, however, and the brief digests of cases are admirably handled and so well blended with the comments of the author that, were it not for quotation marks, it would often be difficult to distinguish between the two. Nor does the author confine himself to a statement of the exact extent of the present jurisdiction and the method of procedure. He has followed the course which so distinguished Professor Thayer's methods — that of treating the entire subject from an historical and philosophical point of view. The subject is, of course, one especially adapted to such treatment.

The plan of the book is well arranged. In a preliminary chapter which, although entitled "Preface," contains much in excess of the usual prefatory remarks, there is "an outline of leading cases from the organization of the court to the present time," which illustrates in an interesting fashion not merely the development of the jurisdiction of the court, but its treatment of the various subjects of law which have come before it. The chief changes in the personnel of the court are also here noted. In an introductory chapter the origin and development of the court is treated at some length. There is an admirable disquisition upon the unique place occupied by the Supreme Court and the causes which brought it into its present position, wherein the scientific treatment of his subject by the author is especially noticeable. The chapter contains brief statements with regard to the effect upon the course of the court caused by the changes in the justices sitting.

The body of the work is divided into six main heads. Part I deals with the original jurisdiction of the court; Parts II, III, and IV deal with the appellate jurisdiction of the court over, respectively, the ordinary federal courts, the special federal courts, and the state courts; Part V discusses "The Great Writs," and Part VI deals with procedure. In two appendices are the rules of the Supreme Court and a collection of practical forms. Then follows an index and a table of cases cited, which shows a collection of some three thousand decisions.

Of the main divisions of the work, those which are most valuable to the ordinary practitioner are of course Parts II, IV, and VI, and they naturally take up the greater part of the text of the book, covering respectively 150, 125, and 165 pages. The arrangement of the topics under the main heads is good, and, while the text is rich in citations and in quotations, the author does not hesitate to give his own explanation and interpretation of the points discussed. In addition to citations of cases there are in numerous instances references to notes or exhaustive collections of cases made by others. The difficult task of stating one after another the leading cases decided by the Supreme Court, which is undertaken in the preface, is likewise skillfully handled.

The portions of the book dealing with the history of the court, and the sections dealing with the court's original jurisdiction, especially the boundary cases, make interesting reading even for a layman. The influence of Marshall, both in extending the jurisdiction of the court and in establishing it in its high place, is well set forth.

The mechanical part of the work is in general well done. The table of cases is not nearly so valuable as it would have been, however, had the names of the defendants been indexed as well as those of the plaintiff, for it not infrequently happens that the name of one of the parties only is recalled by the reader seeking the comment upon a case. The index also is open to the criticism that its list of main heads is altogether too small. It is hard to understand, for instance, why so often used a phrase as "full faith and credit" should not have a place in the alphabetical headings of the index. These, however, are very minor points of criticism.

The text-book is a welcome addition to the hitherto scant literature dealing with the Supreme Court, and will be helpful to every lawyer whose practice takes him before that important body. It will also well repay the study of the law student who wants to become familiar with the jurisdiction and practice of the highest court in the land.

E. E. F.

A TREATISE ON THE LAW OF AGENCY, including Special Classes of Agents, Attorneys, Brokers, and Factors, Auctioneers, Masters of Vessels, etc. By William Lawrence Clark and Henry H. Skyles. In two volumes. St. Paul, Minn.: Keefe-Davidson Co. 1905. pp. liv, 1-1146; 1147-2178. 8vo.

Although the usual preface in which the writer of a new law-book commonly sets forth his aims is wanting in this work, it is easily to be guessed from a slight study of it that the object of our joint authors is the production of a more comprehensive treatise on the subject of Agency than any previously published. To a great extent they have succeeded. The book, in its nineteen hundred and more pages of text, besides stating general principles, treats of the finer points of the subject in detail, and substantiates its conclusions by citations far more exhaustive than those of any other work upon the subject. Add to these merits clearness of treatment, a convenient division and subdivision of topics plainly set forth in a satisfactory table of contents, and a reasonably complete index, all of which are provided by the writers, and we have a book most useful to the attorney seeking for information as to the state of the law.

Nevertheless it is not without its defects. Although it is by no means a mere collection of cases, yet its explanation of the difficult underlying theories of the relation of principal and agent is not so final as the student of the law might wish. For instance, it is certain that the relation of principal and agent, though consensual in its nature, is not strictly a contractual one. This is recognized on page 109, where it is stated: "A contract between principal and agent, as distinguished from mere consent of the principal, is not necessary to authority on the part of the agent. As we have seen, a person who has no capacity to make a binding contract may nevertheless be an agent." But in that section of chapter ii. entitled "Who May Be Principals" there is some tendency to

treat the relation as dependent on contract. Thus on page 47 we read: "At common law a married woman . . . is incapable of entering into a binding contract . . . and she is incapable of appointing an agent or attorney. Except, therefore, in so far as her common law disabilities have been removed by statute, all contracts of agency or appointments of an attorney by a married woman, and all contracts or acts which she undertakes to make or do through the intervention of an agent or attorney are absolutely void." Later, on page 523, is found a discussion of *Freeman's Appeal* (68 Conn. 533), a case in which the court held the guaranty of a married woman delivered in Illinois by her agent to be void, on the ground that by the law of her domicile, Connecticut, where the appointment of an agent was made, she had no capacity to contract, and therefore no power to appoint an agent, and consequently could not be bound by the act in Illinois, whatever might be the law of that state as to her capacity. Our authors remark ". . . this case was really not a construction of the agent's authority, but a construction of the power possessed by the married woman under the laws of Connecticut"; and they quote the language of the court: "The underlying question is, 'Was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority, and by the laws of Connecticut, where she assumed to give such authority, she could not give it.'" It is submitted that the case may be more readily explained as based upon a misconception of the principles of agency, and opposed to the authority of *Baum v. Birchall* (150 Pa. St. 164), not cited by the authors.

Another instance of failure to explain a troublesome principle as clearly as might be wished, is found in the discussion of the nature and extent of the agent's authority. A principal may be liable to a third person for acts of his agent done contrary to his wishes or even his express directions in two cases: first, if he has in some form represented to the third person that the agent has authority to do the acts, and the third person has changed his position in reliance upon those representations, the principal is estopped, upon grounds not in any way peculiar to the subject of Agency, to deny the authority; second, if the principal has given the agent authority to conduct certain matters, but has without notice to the third party given private instructions reducing the agent's discretion below that ordinarily exercised by agents engaged in similar enterprises, the third person is not bound by such instructions, even though on account of lack of representations made directly from the principal to the third party the elements of estoppel do not exist. Whether an estoppel is made out is a matter of no great difficulty; but the determination of the line at which instructions of the principal cease to be effective limitations upon authority and become unimportant so far as the rights of third parties intervene, is probably the most perplexing problem in the subject of Agency. The authors have so confused this topic of "apparent authority" with estoppel in chapter viii. on the "Nature and Extent of Agent's Authority" as to impair seriously the value of the book as a trustworthy statement of the law. It is to be hoped that in a second edition, which the work on its merits should command, this chapter may be rewritten more clearly.

H. LE B. S.

THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES.

By Frank J. Goodnow. New York: G. P. Putnam's Sons. 1905. pp. xxvii, 480.

A previous work by Dr. Goodnow, under the title of *Comparative Administrative Law*, received such praise from competent critics that the present volume was looked forward to with keen expectation. Nor will critical scholars be disappointed with its contents. It is conceived in a thoroughly scientific spirit, and the subject has been worked out with a clearness of expression, an orderliness of arrangement, and a depth of knowledge that will rank the work as a valuable contribution to political science. The magnitude of the task undertaken by the author may be appreciated when it is said that over six hundred

decisions of the courts are cited, and the administrative law not only of the federal government, but of practically all the states of the Union, is summarized. Yet the very comprehensiveness which is one of the work's chief merits, contributes to make parts of it dry and technical, notwithstanding the author's efforts to the contrary. Concrete illustrations of the principles expounded are almost totally lacking. If these could have been inserted, the book would have been longer, but would have seemed shorter. It should be added, however, that the author in his preface promises an additional volume, which will be wholly devoted to the cases or concrete instances.

Mr. A. V. Dicey, the English jurist, having denied the possibility of the existence of administrative law, Professor Goodnow gives in his first chapter a forceful essay on the *raison d'être* of the title he employs. There follows a definition of administrative law as "that part of the law which fixes the organization, and determines the competence of the authorities which execute the law, and indicates to the individual remedies for the violation of his rights." Having thus fixed the scope of his work, the author takes up the federal, state, and local administration and discusses it with reference to the decisions of the courts. The book is specially luminous in the explanation of the actual and theoretical relations to one another of the executive, the legislature, and the judiciary; in the account of the increasing power of the President; and in the exposition of the relations of municipal corporations to the state governments. The discussion of local government brings out clearly the amazing variety of administrative laws, and serves to demonstrate that this broad land has been a fruitful field for political experiment such as the old world could never furnish.

Dr. Goodnow has wisely adopted the historical method wherever it was possible. He explains, for instance, the status of the English borough from mediæval times to the colonial period, thus accounting for the form it assumed in the United States. Again, he points out the interesting fact that while Montesquieu laid down his famous trinity as all sufficient for a state, the American states have added a fourth division, — the administrative department. The passages criticising the tenure of office act (p. 115) and demonstrating the unwisdom of presenting a long list of candidates to the confusion of the voter, serve to lighten the severely technical discussion.

In two instances, at least, the desire for brevity seems to have excluded explanations which the general reader would properly demand. Thus it is stated that "in 1867 Congress deliberately reversed its decision, and by the tenure of office acts of 1867-9 decided . . . that Congress was the body to decide who possessed the power of removal (p. 76). This so-called deliberate change of front is partly explained by a fact which the author omits, *i. e.*, that Congress was engaged at the beginning of this period in a fierce conflict with the President and had "an axe to grind." So on page 390, where it is stated that "by the original constitution a state might be sued by a citizen of any other state," the proper reference should have been given to the case of *Chisholm v. Georgia*; and the reader should have been told that the decision was rendered by a divided court, and that it was opposed to a wide-spread opinion of jurists at the time the Constitution was ratified. In the light of these facts the adoption of the eleventh amendment is more easily understood.

It seems to be a positive error to state that the last case of impeachment in England was that of Warren Hastings (p. 459). Lord Melville was impeached as late as 1806.

With the book of cases to follow, the present work should prove as useful a text-book to the practical lawyer as to the student of political science. There is a full table of cases cited, a list of authorities, and an excellent index.

J. R. F.

ADDRESSES: HISTORICAL, POLITICAL, SOCIOLOGICAL. By Frederick R. Coudert. New York: G. P. Putnam's Sons. 1905. pp. xviii, 452.

The opinions of a distinguished and successful lawyer will seldom be found profitless reading. A proof of this is to be found in the newly published volume of addresses delivered by the late Frederick R. Coudert, formerly among the leaders of the New York bar. The variety of the subjects comprehended testifies to the many interests in which the speaker found time to indulge, despite the demands of his profession.

The first section of the book in question, amounting to about one third its length, is that of most interest to lawyers. This is devoted to four addresses upon topics of International Law: I, International Arbitration; II, The Anglo-American Arbitration Treaty; III, The Rights of Ships; IV, International Law. Upon these subjects Mr. Coudert was entitled to speak with authority. In the first address he discusses the development of civilization and national economy, and their influence towards arbitration, and insists upon the folly of wasting life, and inviting bankruptcy, merely because of loss of temper or injured pride. He commends the course of the United States in this respect, more particularly in its relationship with Great Britain, furnishing a number of examples where arbitration proved a more happy expedient than the dictates of anger. In the second essay he takes up the Arbitration Treaty between the United States and Great Britain, then pending (March, 1897) in the Senate, answering Lord Russell's question "Who will compel the contracting nations to arbitrate?", and refuting the objection that the Monroe Doctrine might be made a matter for arbitration. Address No. III contains a short discussion of the basis of International Law, and a consideration of the question as to what law obtains upon a vessel of one country in the port of another. *Barrundia's Case* is taken as an example of the situation which may arise, and receives especial attention. The conclusions to which Mr. Coudert comes, with regard to the more vexing points, are not too clear, but the general law is made plain, and the opinions of several distinguished statesmen and judges discussed. The fourth address is upon the nature of International Law, and taken in conjunction with the opening paragraphs of the third furnishes a sound and sensible statement of what that law really is, a statement which should prove helpful to those who, coming new to the subject, have yet to realize that the word "law," as applied to international regulations, is a misnomer. The speaker has no sympathy with fanciful theories based upon "Natural Law," "Primitive Law," or "Divine Law," but says at once that International Law, so called, consists of "certain rules of self-denial, forbearance, and courtesy, which have been found conducive to the mutual interest of men." He defines it as "the result of an implied agreement among civilized nations to abide by those practices which have proved most conducive to the promotion of profitable intercourse in peace, and to the mitigation of suffering and hardship in war."

The remaining two thirds of the book are given to the discussion of subjects so general as to make a brief summary impossible. They contain, in part, addresses on Columbus, Kossuth, Andrew Jackson, Charles O'Connor, and Montesquieu; addresses on moral and social questions; an interesting article on "The Bar of New York from 1792-1892," and another on "Young Men in Politics." An address entitled "The Lawyer's Responsibilities" gives Mr. Coudert's views upon codification. This portion of the book is only occasionally of primary interest to lawyers, but the general reader should find little that is uninteresting.

In criticising the volume as a whole it must in fairness be said that the subjects lose much from having been presented in comparatively short addresses. Time and occasion did not permit the speaker to go so fully into them as we should often like, and much that was calculated to keep the audience good tempered could be dispensed with by the reader, if only he could have in its place an equal amount of matter written to the point. This, however, is but another way of saying that the questions which Mr. Coudert has raised are of such interest that we can but wish he had had time to give us more than a single volume.

A. H.

STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW. By A. Inglis Clark. Second edition. Melbourne: Charles F. Maxwell. 1905. pp. xvi, 447. 8vo.

As soon as the Constitution of the Australian Commonwealth was framed, lawyers acquainted with its provisions saw clearly enough that there might soon arise in Australia a body of decisions and treatises useful to persons interested in the constitutional law of the United States; for the Australian Constitution creates a federation, divides between the federation and the states the various functions of government, reserves to the states the powers not delegated to the federation, uses many of the expressions found in the Constitution of the United States, and gives to the federal courts the function of deciding, in the course of ordinary litigation, whether the legislative acts of the federal government and of the states are unconstitutional and void. Inevitably American cases and treatises gain a new importance in Australia; and Australian cases and treatises gain a new importance in America.

The author of the present treatise, for the last seven years a judge of the Supreme Court of Tasmania, which is one of the states of the Australian Commonwealth, was among the first to emphasize the applicability and controlling influence of American constitutional decisions. His first edition appeared in 1901. At that time there were no decisions upon the Australian Constitution, for the instrument went into effect on the first day of January in that year. The first volume of the Australian Commonwealth Law Reports contained at least three constitutional cases, in each of which use was made of American authorities; and two of these Australian cases — to quote the words of the author — “have authoritatively declared that the doctrines and principles of federal constitutional law which were enunciated by the Supreme Court of the United States in the case of *McCulloch v. Maryland*, as those which should govern the interpretation of the Constitution of that country, are equally applicable to the interpretation of the Constitution of the Commonwealth of Australia.” As the author’s view of the value of American decisions has been upheld, he now offers an enlarged edition, in which he adds a treatment of new topics and gives to American cases still greater prominence. E. W.

PRINCIPLES OF CONTRACTS AT LAW AND IN EQUITY. A Treatise on the General Principles Concerning the Validity of Agreements. By Sir Frederick Pollock. Third American from the Seventh English Edition. With Annotations and Additions by Gustavus H. Wald and Samuel Williston. New York: Baker, Voorhis & Co. 1906. pp. cliv, 985. 8vo.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XX. For the year 1905. Year Books of Edward II. Vol. III., 3 Edward II. A. D. 1309–10. Edited for the Selden Society by F. W. Maitland. London: Bernard Quaritch. 1905. pp. xciv, 242. 4to.

BRIEF MAKING AND THE USE OF LAW BOOKS. By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Alfred E. Mason, and James E. Wheeler. Edited by Nathan Abbott. St. Paul, Minn.: West Publishing Co. 1905. pp. viii, 472. 8vo.

CENTRALIZATION AND THE LAW. Scientific Legal Education. An Illustration. With an introduction by Melville M. Bigelow. Boston: Little, Brown, and Company. 1906. pp. xvii, 296. 8vo.

CONDITIONAL AND FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS. By Albert Martin Kales. Chicago: Callaghan and Company. 1905. pp. xlv, 453. 8vo.

THE LAW OF PASSENGER AND FREIGHT ELEVATORS. Second and revised edition. By J. H. Webb. St. Louis: The F. H. Thomas Law Book Co. 1905. pp. xviii, 375. 8vo.

PROCEDURE: ITS THEORY AND PRACTICE. By William T. Hughes. In two volumes. Chicago: Callaghan and Company. 1905. pp. x, 1–390; 401–1289. 8vo.

- SELECTED CASES ON THE LAW OF QUASI-CONTRACTS. By Edwin H. Woodruff. Indianapolis: The Bobbs-Merrill Company. 1905. pp. xvi, 692. 8vo.
- DIE LEHRE DER RECHTSSOUVERÄNITÄT. Beitrag zur Staatslehre. Von Dr. H. Krabbe. Groningen: J. B. Wolters. 1906. pp. 254. 8vo.
- A TREATISE ON THE LAW OF DOMESTIC RELATIONS. By Joseph R. Long. St. Paul: Keefe-Davidson Company. 1905. pp. xiv, 455. 8vo.
- TRAITÉ DE LA LOCATION DES COFFRES-FORTS. Par M. Jules Valery. Paris: Albert Foutemoing. pp. vi, 151. 8vo.

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EQUITABLE CONVERSION.¹

VII.

WHAT is the duration of an indirect equitable conversion of land into money or of money into land? It is the same as that of the contract, trust, or duty which brings it into existence, or, more strictly, it is the same as that of the right, which such contract, trust, or duty creates, to have an actual conversion made, and to receive some portion of the money or land into which the actual conversion is to be made, or some limited interest in such money or land; and the duration of this right is not always the same as that of the contract, trust, or duty which creates it, as the latter may be conditional, *i. e.*, subject to a condition precedent, and in that case the right is not created until the condition is performed or satisfied. A distinction must, however, be made between a contract, trust, or duty which is conditional and one which is not to be performed till a future day, for the mere fact that a contract, trust, or duty is not to be performed till a future day does not prevent or delay the creation of a right, — it merely renders the right incapable of being enforced until the time arrives when the contract, trust, or duty is to be performed. If, indeed, an indirect equitable conversion were an equitable substitute for an actual conversion, *i. e.*, if it were an equitable exchange of money for land or land for money, it would follow that a contract, trust, or duty to make an actual conversion at a future day could not cause an equitable conversion before that day arrived; but, as an equitable conversion merely causes the right to have an actual conversion made

¹ Continued from 19 HARV. L. REV. 249.

to devolve as the thing into which the conversion is to be made would devolve, if the conversion had been actually made, it is plain that the equitable conversion should come into existence as soon as the right is created. If, therefore, land be conveyed by deed in trust to sell the same, and dispose of the proceeds as directed by the deed, the equitable conversion will take effect on the delivery of the deed, though the sale be not to be made till the grantor's death.¹

As a deed takes effect the moment that it is delivered, while a will takes effect the moment the testator dies, it follows that, in the absence of any suspensive condition, there will be a corresponding difference in the time when an equitable conversion will take effect, according as it is created by a deed or by a will, *i. e.*, that, if created by a deed, it will take effect on the delivery of the deed, and consequently during the lifetime of the person who creates it, while, if created by will, it will not take effect till the moment of the testator's death.²

There being, then, no room for doubt as to when an indirect equitable conversion begins, the only remaining question upon which the duration of such a conversion depends is, when does it end? This question, however, is much wider and incomparably more difficult than the question when does it begin, and the answer to it is also much less certain. There is, indeed, a limit of time beyond which it is not possible that any indirect equitable conversion should endure, namely, the time when the right which brought it into existence is extinguished by a performance of the correlative obligation or duty. It seems possible also, upon principle, to go a step further by saying that no equitable conversion can endure after the contemplated actual conversion is made, for an equitable conversion is always and necessarily superseded by the actual conversion in contemplation of which the equitable conversion was created. Moreover, though the right which brought the equitable conversion into existence may not be entirely extinguished, yet its nature will then be changed. Thus, in the case of the ordinary contract for the purchase and sale of land, if the vendor convey the land without requiring the concurrent payment of the purchase money, his land will thereby be actually converted into money, and, though the vendor will still be entitled to receive the money from

¹ See *Clarke v. Franklin*, 4 Kay & J. 257. And see 19 HARV. L. REV. 29, n. 2.

² *Elliott v. Fisher*, 12 Sim. 505. See also the judgment of Wigram, V. C., in *Griffith v. Ricketts*, 7 Hare 299, 311-312.

the purchaser, yet his right to receive it will have undergone a radical change, the relations between the parties to the contract having ceased to be those of vendor and purchaser and having become that of debtor and creditor. So if the purchaser voluntarily pay the purchase money without requiring a concurrent conveyance of the land, his money will thereby be actually converted into land, and, though the purchaser will still be entitled to receive a conveyance of the land from the vendor, yet his right to receive it will have become that of an equitable owner of the land, and, in fact, the contract which caused the equitable conversion, as also in the case previously put, will have come to an end. So if a covenant be made, or a trust be created to lay out money in the purchase of land, and to settle the land, and the land be purchased, the money will be actually converted into land, and though the person or persons in whose favor the settlement was to be made will still be entitled to have it made, yet he or they will be so entitled, not by virtue of the original right created by the covenant or trust, but by virtue of an equitable ownership of the land purchased, coextensive with the legal ownership which he or they would have acquired if the settlement had been made. Finally, if a duty be created to purchase and settle land, for example, if a testator direct his executor to lay out money in the purchase of land and to settle the land, and the executor purchase the land and receive a conveyance of it, the money will be thereby actually converted into land, and the duty imposed upon the executor will be performed, the legal title to the land will have vested in him, and he will hold it as a trustee for those in whose favor the settlement was directed to be made.

How may an indirect equitable conversion be ended without any performance of the contract, trust, or duty by which it was brought into existence? In the case of a contract for the purchase and sale of land, the equitable conversion in favor of each party to the contract will come to an end whenever the contract comes to an end, and how the contract may be brought to an end without being performed is a question which belongs to the subject of contracts rather than to that of equitable conversion. The equitable conversion in favor of either party will also be ended by a total breach of the contract by him, or by his losing the right to enforce the specific performance of it.

An equitable conversion created by a covenant, trust, or duty to purchase and settle land, is seldom put an end to in either of the

modes mentioned in the last paragraph. It is, however, liable to be put an end to otherwise than by a performance of the covenant, trust, or duty, and that, too, in modes which are peculiar to this class of covenants, trusts, and duties, and which constitute an important branch of equitable conversion.

Such an equitable conversion will be put an end to by the complete exhaustion of the gift or gifts which are made, or covenanted to be made, of the land to be purchased. As no such equitable conversion can come into existence without some such gift or gifts, it necessarily follows that there will cease to be any such conversion when there ceases to be any such gift; and this proposition rests upon authority, as well as upon principle, in the case of a covenant to purchase and settle land,¹ though, in the case of a trust or duty created by will for the same purpose, the authorities do not recognize the necessity of any gift of the land to be purchased either to cause an equitable conversion or to keep it in existence.² This, however, is not because the two cases differ at all in principle, but because the authorities applicable to the one case differ from those applicable to the other.

How is the exhaustion of such gift or gifts liable to happen? By the death, or the death and failure of issue of all the persons in whose favor they are made. When the equitable conversion is caused by a covenant to purchase and settle land, the settlement covenanted to be made is generally limited to estates for life and estates tail, the ultimate reversion in fee simple being retained by the settlor, while, in the case of a trust or duty created by will for the same purpose, the settlement directed generally extends to the entire fee simple. This difference, however, in the extent of the settlement, does not affect the extent of the equitable conversion, which in either case will extend only to the estates for life and estates tail covenanted or directed to be limited, for, in respect to the equitable conversion, it is not at all material whether the ultimate fee simple in the land to be purchased be retained by the settlor as a reversion, or be limited to someone else by way of remainder. If it be retained by the settlor, he will be the absolute owner of the money to be laid out subject only to the rights of those in whose favor estates for life or estates tail are to be limited. So long as there exists any person, who in case the money be laid

¹ See 18 HARV. L. REV. 264.

² 19 HARV. L. REV. 24, proposition 8.

out will be entitled to have the land conveyed to him for an estate for life or in tail in possession, that person alone will be entitled to require land to be purchased with the money and settled. When there ceases to be any such person, the right of the settlor to the money will be absolute, and though he, or anyone in whom his right shall be vested, will be entitled to purchase land with the money if he chooses, it will be by virtue of his absolute ownership of the money, and not by virtue of any relative right, and it is a relative right alone that can cause an equitable conversion.¹ Moreover, what is thus true of a settlor who retains the ultimate fee simple of the land to be purchased, is also true of a remainderman to whom such ultimate fee simple shall be covenanted or directed to be limited.² The conclusion, therefore, is that every equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land, and to settle the land, will necessarily come to an end as soon as there ceases to be any person who is entitled to have the money laid out in the purchase of land, and to have the land conveyed to him for an estate for life or in tail in possession.

The equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land and to settle limited interests in the land, will also come to an end whenever any person shall acquire an absolute ownership of the money, though such limited interests covenanted or directed to be settled in the land to be purchased be not exhausted; and such absolute ownership of the money may now³ be acquired by any person, of full age and *sui juris*, who is entitled to an estate tail in possession in the land to be purchased, and to have the same purchased immediately. How may such a person acquire an absolute ownership of the money? The answer to that question involves a little history. Prior to the time of Lord Chancellor Cowper, the Court of Chancery would decree the payment of it to him upon his filing a bill for that purpose.⁴ The theory upon which this was done was that, if the land were actually purchased, he could convert his estate

¹ 18 HARV. L. REV. 248, 250, 260-261.

² In 18 HARV. L. REV. 268, I erroneously stated that, in the case of a trust to purchase land and convey the same to "A for life, remainder to B in tail, remainder to C in fee, there will be a conversion in equity of the entire interest in the money into land."

³ See 3 & 4 Wm. IV. c. 74.

⁴ *Per* Vernon, *arguendo*, in *Chaplin v. Horner*, 1 P. Wms. 483, 485; *per* Lord Hardwicke in *Cunningham v. Moody*, 1 Ves. 174, 176.

tail into an estate in fee simple by suffering a common recovery; and, as a recovery could not be suffered of money, though converted in equity into land, equity was bound to provide some substitute for it, and that a bill in equity was the only substitute that equity could provide. Lord Cowper, however, refused to allow such a bill,¹ thinking it an infringement of the rights of those who might become entitled to the land by way of remainder or reversion expectant on the termination of the estate tail in question, and the rule thus established was followed till the end of the eighteenth century, when the old rule was restored by Lord Eldon's Act,² and the court was also authorized to grant the relief upon petition without the filing of a bill. That Act remained in force until it was superseded by 7 Geo. IV.,³ which, however, differed from Lord Eldon's Act only in being more comprehensive. The latter Act was in turn superseded by 3 and 4 Wm. IV.,⁴ which introduced very radical changes.

The substitute for common recoveries which was originally adopted by the Court of Chancery, and restored by Lord Eldon's Act was, like common recoveries themselves, open to two very serious objections, namely, first, it required a considerable amount of time to carry it through, and in the meantime the person on whose behalf the bill or petition was filed might die, and thus his purpose be wholly defeated. His loss would, of course, be the gain of the person next entitled, but it would be a gain for which he would be indebted solely to accident, and to which he would have no claim in justice. Secondly, the filing of a bill and obtaining a decree thereon was attended with a relatively great and unnecessary expense. Common recoveries being also open to the same two objections in at least an equal degree, they were abolished by 3 and 4 Wm. IV. c. 74, and disentailing deeds substituted in their place. Moreover, by section 71 of the same Act, a disentailing

¹ *Colwall v. Shadwell*, stated by Lord Parker in *Short v. Wood*, 1 P. Wms. 470, 471, and by Vernon, *arguendo*, in *Chaplin v. Horner*, 1 P. Wms. 485. It does not appear in what year *Colwall v. Shadwell* was decided. It could not, however, have been earlier than 1714, as Cowper did not become Lord Chancellor until September of that year. The case of *Benson v. Benson*, Mich., 1710, 1 P. Wms. 130, before Sir John Trevor, M. R., was therefore correctly decided in accordance with the old rule, though the learned judge seems to have made the singular mistake of supposing that a common recovery would not have been necessary to make the plaintiff the absolute owner in fee simple of the land to be purchased, and that a fine would have been sufficient. See also *Collet v. Collet*, 1 Atk. 11; *Calthrope v. Gough*, 4 T. R. 707, n. a.

² 39 & 40 Geo. III. c. 56.

³ c. 45.

⁴ c. 74.

deed was provided as a substitute for a bill or petition in equity in case of money converted in equity into land, *i. e.*, it was provided that a disentailing deed of assignment of the money, executed and delivered by a person entitled to have the money laid out in the purchase of land, and to have the land conveyed to him for an estate tail in possession, should transfer the absolute ownership of the money.

Suppose one A to have been entitled, prior to the Act just referred to, to have money laid out in the purchase of land, and to have the land conveyed to him for an estate tail in possession, with remainder, immediately expectant on the termination of such estate tail, to him in fee, or that he otherwise acquire the right to have the remainder or reversion in fee expectant on the termination of his estate tail, conveyed to him: It would still be true that A would not be the absolute owner of the money, as the estate tail would not merge in the remainder or reversion in fee.¹

¹ There are, however, one or two authorities, in the first half of the eighteenth century, which it seems impossible to reconcile either with the other authorities or with principle. Thus, in *Edwards v. Countess of Warwick*, 2 P. Wms. 171, where, by marriage settlement, the intended husband covenanted that £10,000, part of the intended wife's marriage portion, should be laid out in the purchase of land, and that the land should be settled on himself for life, remainder to the first and other sons of the marriage, successively, in tail male, remainder to himself in fee, and the husband afterwards died, leaving one son, issue of the marriage, who attained twenty-one, but died soon after without issue and intestate, Lord Macclesfield said (p. 174): "If there had been so much as a parol direction from the last Lord Warwick, for the payment of this £10,000 to his mother the Countess dowager, I should have had a regard to it; being of opinion that it was in the election of the last Earl to have made this money, or to have disposed of it as money." If the money had been laid out in land, as the last Lord Warwick would have been tenant in tail male of the land, with remainder to himself in fee, he could, by levying a fine, have made himself tenant in fee simple absolute. So also, though no fine were levied, his estate tail would have expired on his death without issue male, and his remainder would have become a fee simple in possession, and therefore he might have devised the land in fee simple, and the devise would have taken effect according to its terms, and, if he had conveyed away his remainder by deed, it would have become a fee simple in possession in the grantee at the moment of the grantor's death; but the only way in which the last Lord Warwick could have made himself tenant in fee simple in possession of the land during his own life would have been by levying a fine, as stated in the text. It follows, therefore, that the only way in which he could make himself the absolute owner of the £10,000 during his life was by filing a bill and obtaining a decree for the payment of it to him; for, if he had obtained payment of it to himself without a decree, and had died, leaving a son, the latter could have required the money to be laid out in land for the purposes of the settlement, even though the father had disposed of it during his life. What Lord Macclesfield said, however, was only a *dictum*, no such case being before him. But so much cannot be said of the case of *Trafford v. Boehm*, 3 Atk. 440, where a woman, about to marry, assigned money to trustees in trust to lay the same out in

On the other hand, A could put an end to his estate tail without suffering a common recovery, *i. e.*, he could, by levying a fine convert his estate tail into a base fee, which, by uniting with the remainder or reversion in fee, would form a fee simple absolute. A fine could not be levied, however, any more than a recovery could be suffered, of money, even though it were converted in equity into land.¹ Would then the Court of Chancery decree payment of the money to A on his filing a bill for the purpose of obtaining such payment? So long as that court held such a bill to be an adequate substitute for a common recovery, it followed, *a fortiori*, that it must be held to be an adequate substitute for a

land, and to settle the land on her intended husband and herself for their respective lives and the life of the survivor, remainder to the first and other sons of the marriage successively in tail male, remainder to the daughters of the marriage as tenants in common in tail general, remainder to the survivor of husband and wife in fee, and there were several children of the marriage, and, the wife being dead, and the money not having been laid out in land, and being in the husband's possession, who (as the Lord Chancellor said) regarded it as absolutely his own, he gave the same by his will to his eldest son, giving legacies also to his other children; and, after his death, all the children accepted the legacies given to them in full of all claims against their father's estate, and discharged his executors; and Lord Hardwicke held that these acts barred the claims, not only of all the other children under their mother's settlement, but of their issue as well, and made the eldest son the absolute owner of the money.

On the death of the father, his eldest son became entitled, under his mother's settlement, to have the money in question laid out in land, and to have the land conveyed to him in tail male in possession, remainders over in tail to his brothers and sisters, and he was also entitled, under his father's will, to have the ultimate remainder in fee in the land conveyed to him, and therefore he might have made himself the absolute owner of the money by filing a bill, making all his brothers and sisters defendants thereto, and obtaining a decree for the payment of the money to him, but it is not perceived how his possession of the money could, without a decree, affect the rights of the issue of his brothers and sisters. Lord Hardwicke says the fact that he already had the money in his own hands precluded his filing such a bill as I have mentioned. That difficulty was one, however, which he had to meet the best way he could, for example, by returning the money (which he had no right to the possession of) to his mother's trustees. Lord Hardwicke also says a court of equity decrees to a party only what he is entitled to before the decree is made. If, however, the bill and the decree in question served as a substitute for a fine, it follows that they constituted an exception to Lord Hardwicke's rule, and would have created a new right in the plaintiff.

It may be added that the eldest son died without issue about six years after the death of his father and about six years before Lord Hardwicke's decision, and, about twenty months after the death of the eldest son, the second son died, leaving an infant son. The latter was, therefore, under his grandmother's settlement, entitled, on the death of his father, to have the money in question laid out in land, and to have the land conveyed to him in tail male in possession, and, of course, he was not bound by any of the acts which Lord Hardwicke held to have barred his right, even if he was living when those acts were performed.

¹ See 19 HARV. L. REV. 240, n. 1.

fine. When, however, Lord Cowper had successfully established the rule that a bill in equity was not a substitute for a common recovery, did it or not follow that it was not a substitute for a fine? That question appears to have first arisen in a case,¹ before Lord Cowper's immediate successor, Lord Chancellor Parker (afterward Lord Macclesfield), and was decided by him in the negative, particular stress being laid upon the fact that a recovery could be suffered only in term time, while a fine could be levied equally well in vacation; and, though his immediate successor, Lord King, persistently refused² to follow his decision, yet the authority of the latter was fully restored by Lord King's successors,³ and it was not only followed until the passage of Lord Eldon's Act, but furnished the rule which that Act applied by analogy to cases in which a common recovery would be necessary. Finally, 3 and 4 Wm. IV. c. 74,⁴ in providing for cases in which money was converted into land in equity, made no distinction between those cases in which, if land had been purchased, a common recovery would have been necessary to convert an estate tail in the land into an estate in fee simple, and those in which a fine would have been sufficient.

Whenever the execution of a disentailing deed of assignment of money converted in equity into land now has the effect of making the person in whose favor it is executed the absolute owner of the money, there is no doubt that it also has the effect of putting an immediate end to the equitable conversion. So also whenever a decree or order of a court of equity for the payment, to a person named, of money converted in equity into land formerly had the effect of making such person the absolute owner of the money, there is no doubt that it also had the effect of putting an immediate end to the equitable conversion. I have hitherto assumed also that the mere fact of any person's becoming the absolute owner of

¹ *Short v. Wood*, 1 P. Wms. 470.

² *Eyre's case*, 3 P. Wms. 13; *Onslow's case*, reported by Mr. Cox in his note to *Eyre's case*.

³ In the note just referred to, published in 1787, Mr. Cox says: "The present practice conforms to the Lord Parker's opinion." In *Ex parte King*, 2 Bro. C. C. 158, decided in the same year, Lord Thurlow says (p. 160): "Where a man has a life estate in money, remainder to the heirs of his body, remainder to himself in fee, as he could, if the estate was in land, obtain the absolute interest by levying a fine, the court would order the money to be paid to him, though it would not where a recovery was necessary." Finally, the recitals in Lord Eldon's Act state the then existing practice with great fulness and in entire accordance with Lord Parker's decision, *supra*.

⁴ S. 71.

money converted in equity into land has the immediate effect of putting an end to the equitable conversion. The courts, however, do not so hold. They say the reason why the execution of a disentailing deed or the obtaining of a decree or order of a court of equity has the effect of putting an immediate end to the equitable conversion is that, besides making the person executing the deed or obtaining the decree or order the absolute owner of the money, it shows an intention on his part to put an end to the equitable conversion, and they hold such an intention to be necessary. Therefore, they lay down for a rule that in order to put an end to the equitable conversion there must not only be an absolute ownership of the money, but such owner must elect¹ not to have the money converted into land.

What is the theory upon which this view rests? Evidently it is the theory that an equitable conversion is, like an actual conversion, a thing done, and that, as personal property which is actually converted into real property will continue to be real property until it is actually reconverted into personal property, so personal property which is converted in equity into real property must continue to be real property in equity until equity reconverts it into personal property. Accordingly, the courts of equity constantly say that money which is converted in equity into land is *impressed by equity* with the quality of land, and they constantly assume that the impression so made must remain until it is removed by the same authority by which it was made. This theory, however, proceeds upon a false analogy. 1. An equitable conversion is not a thing done, but is a mere consequence deduced by equity from a thing agreed or directed to be done, and therefore it will continue to exist only so long as the agreement or direction which brought it into existence remains in force. 2. The theory erroneously assumes that a covenant or direction to lay out money in the purchase of land, and to settle the land, converts the money in equity directly into land, whereas it merely creates one or more rights to have the covenant or direction performed, and equity causes such a right to devolve, on the death of its owner, as the land would

¹ *Lingen v. Souroy*, 1 P. Wms. 172; 10 Mod. 39; *Crabtree v. Bramble*, 3 Atk. 680; *Bradish v. Gee*, Amb. 229; *Biddulph v. Biddulph*, 12 Ves. 161; *Kirkman v. Miles*, 13 Ves. 338; *Davies v. Ashford*, 15 Sim. 42; *Harcourt v. Seymour*, 2 Sim. N. S. 12; *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Freemantle*, 17 Beav. 314; *Brown v. Brown*, 33 Beav. 399; *Sisson v. Giles*, 3 DeG., J., & S. 614, 9 Jur. N. S. 512, 951; *Meredith v. Vick*, 23 Beav. 559; *Mutlow v. Bigg*, 1 Ch. D. 385; *Meek v. Devenish*, 6 Ch. D. 566; *In re, Gordon*, 6 Ch. D. 531.

have devolved if the conversion had been actually made; and therefore it is not possible that there should be any equitable conversion after there has ceased to be any such right, and it is not possible that any such right should continue to exist after the covenant which created it has ceased to exist, or after the direction which created it has ceased to be in force. 3. The courts have acted inconsistently in holding that an equitable conversion of money into land will continue to exist, notwithstanding that a single person has become the absolute owner of the money, and yet that an election by such owner not to have the money actually converted into land will instantly put an end to the equitable conversion, for that is to hold that the continuance of an equitable conversion ultimately depends upon the will of the person in whose favor alone it exists, and yet it is as clear as anything in law can be that the mere will of the owner of property as to what shall or shall not be done with that property has no legal significance, and cannot properly be a subject of legal inquiry, unless such will be duly declared by him in his last will and testament.

Moreover, the view which I have been controverting is as inconvenient in practice as it is wrong in principle; for it often happens that an agreement or direction to lay out money in the purchase of land, and to settle the land, is never in fact performed, not because of any unwillingness or refusal to perform it, but because no one desires or cares to have it performed, and accordingly the money not being laid out in the purchase of land is invested in some other mode, and remains so invested, and no question ever arises in regard to the conversion covenanted or directed to be made, unless some person, perhaps fifty years after the covenant was made or the direction given, finds it for his interest to claim that the money is still converted in equity into land, and, if it so happens, the question is likely to depend, according to the doctrine in question, upon whether there has been an election not to have the conversion made, and that again is likely to depend upon what is the true inference to be drawn from a long course of conduct, the person whose conduct thus becomes the subject of inquiry, if still alive having probably forgotten, if he ever knew, that such a covenant was ever made or such a direction ever given; and such an inquiry is likely to be not only very vexatious and troublesome as well as very expensive, but also very fruitless, so far as regards the ascertainment of truth. Indeed, those who have the misfortune to be involved in a litigation upon such a question

will generally find it for their mutual interest, whatever may be the value of the property involved, to decide the question by drawing lots.

There is, however, one class of cases in which it is agreed by all that there will cease to be any equitable conversion, though the actual conversion covenanted or directed to be made has not been made, and though there has been no election not to have it made, namely, where the absolute owner of money which has been converted in equity into land has the money in his own hands, — in which case the money is said to be *at home*,¹ and it seems not to be material whether he has possession of the money in his own right or as executor only. Moreover, it seems not to be indispensably necessary that he should be entitled to have the land conveyed to him in fee simple absolute, for, though he be entitled only to have it conveyed to him for his life, with remainder to him in fee simple absolute, and though these limitations in his favor are liable to open and let in a limitation in tail to any son of his who shall hereafter be born, for, if he get the money into his own hands, even as executor, it seems that the equitable conversion of the money into land will be suspended until he shall have a son, and, if he die without ever having had a son, the equitable conversion will never revive, and the money will devolve, at his death, as money. Both these points are illustrated by the great case of *Pultney v. Darlington*,² in which Sir John Scott, Attorney-General, Mr. Charles Fearn, and Mr. W. Dundas struggled valiantly, but unsuccessfully, to reverse Lord Thurlow. In that case Henry Guy, who died in 1710, directed his executors to lay out the residue of his personal estate in the purchase of land, and to settle the land on William Pultney, afterwards Earl of Bath, for life, remainder to his first and other sons successively in tail male, remainder to Harry Pultney, brother of William, and his first and other sons in like manner, remainder to Daniel Pultney, a cousin of William and Harry, and his first and other sons in like manner, remainder to the father of William and Harry in fee. The father died in 1715, whereupon his right under the will to have the land conveyed to him in remainder in fee passed to William Pultney, his eldest son and heir.³ In 1731 Daniel Pultney died without issue male. In

¹ *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, 224; *In re Gordon*, 6 Ch. D. 531, 535, 537, *per* Sir G. Jessell, M. R.

² 1 Bro. C. C. 223, 7 Bro. P. C., Tomlin's ed. 530.

³ It has always been assumed that this remainder in fee descended, on the deaths

1764 the Earl of Bath died without issue male, whereupon his right to said remainder in fee passed to said Harry Pultney, his brother and heir. On the death of the Earl of Bath, therefore, Harry Pultney was entitled, upon the facts which have been stated, to have the residue of Henry Guy's personal estate laid out in the purchase of land, and to have the land conveyed to him for life, remainder to him in fee. He was not, however, even to the last moment of his life, entitled to have the money paid over to him, for if land had been purchased and settled, the two limitations in his favor, as above, would have been liable to open and let in limitations in favor of his sons; for, though he was about eighty-six years old and a bachelor, yet in legal contemplation it was possible that he should marry and have sons; and, though in fact he did neither, yet, upon the facts thus far stated, the equitable conversion of the money into land remained in force till his death, and on his death his rights under the will of Henry Guy devolved as land. There was, however, another material fact, for the Earl of Bath was executor of Henry Guy, and Harry Pultney was the executor of the Earl of Bath, and by consequence executor of Henry Guy, and therefore, on the death of the Earl of Bath, the money was *at home*, and so remained till the death of Harry Pultney, when it devolved as money; and yet there had been no election not to have an actual conversion made, and could have been none, Harry Pultney not being the absolute owner of the property.¹

How may an equitable conversion of land into money, not caused by a bilateral contract for the purchase and sale of land, be brought to an end without an actual conversion? Such an equitable conversion is generally caused by a direction in a will to sell land and divide the proceeds of the sale among persons designated by the testator; and it is plain that in such a case there will seldom be any unnecessary delay in making a sale, as the interest of each of the persons designated by the testator will be likely to be promoted by a sale. If, however, in any given case all the persons designated by the testator shall be of one mind in preferring the land to

of its respective owners, to their respective heirs, as stated in the text. On principle, however, it seems that the equitable conversion caused by the will of Henry Guy did not extend to the ultimate interest limited to the father of William and Harry Pultney, and therefore that ultimate interest ought to have devolved as money. See *supra*, pp. 324-325.

¹ The decision of the House of Lords was made in 1796, eighty-six years after the death of Henry Guy, when the residue of his personal estate was still personal estate in fact and had not lost its identity.

the proceeds of its sale, they may, if of full age and *sui juris*, require the land to be conveyed to them, and thus put an end to the equitable conversion. So if, in any given case, the number of persons entitled to share in the proceeds of a sale of the land shall, by death or otherwise, be reduced to one before any sale of the land is made, a consequence will be that that one will be, in equity, the sole owner of the land in fee simple, and hence if the equitable conversion still exists it will be because he has not elected to take the land instead of the proceeds of its sale, and the courts, as we have seen, say it does still exist, notwithstanding the oddity of saying that land of which one person is the sole and absolute owner must be treated as converted in equity into money until such owner has elected not to have it actually converted into money pursuant to the direction of a deceased person whose direction has ceased to have any force whatever.

Here ends all that I propose to trouble the reader with on the subject of the indirect conversion of money into land and land into money.

C. C. Langdell.

CAMBRIDGE, October, 1905.

STATE AND OFFICIAL LIABILITY.

IN the sixth edition¹ of Mr. A. V. Dicey's interesting volume, commonly called "Dicey on the Law of the Constitution," but whose full title is "Introduction to the Study of the Law of the Constitution," is found a chapter² entitled "The Rule of Law Contrasted with *Droit Administratif*." This title suggests that the *droit administratif*, which is in this manner contrasted with the rule of law, must be something lawless and arbitrary; that the words *droit administratif* cannot be used in the sense in which we employ the term "administrative law," but rather must signify some sort of administrative right or might, the word *droit* being employed much as in the motto "Dieu et mon droit." Examination of the subject matter of the chapter, however, shows that the term is intended to be used in the same sense as the French legal writers employ it, and that the chapter is devoted to an exposition of the general doctrines of French administrative law, and a statement of Mr. Dicey's view of those doctrines, which is, to say the least, not favorable.

Mr. Dicey is an author of such deservedly high reputation, and his statements naturally carry such weight with both English and American readers, that an unfavorable opinion expressed by him regarding the doctrines of French administrative law is calculated to exercise material influence on opinion as to the advisability of the study of that law, — a study which is attracting more and more attention in this country, especially since the publication of Professor Goodnow's able work on Comparative Administrative Law.

It is therefore important to examine Mr. Dicey's exposition of the doctrines of French administrative law, and to direct attention to those points, if any, wherein that exposition seems imperfect or likely to mislead.

After stating³ that the words "administrative law," which are the most natural rendering of the term *droit administratif*, are unknown to English judges and counsel and are in themselves hardly intelligible without further explanation, Mr. Dicey describes⁴ the meaning of the term *droit administratif* as "that portion

¹ 1902.² No. XII.³ P. 323.⁴ P. 326.

of French law which determines (1) the position and liabilities of all state officials, and (2) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the state, and (3) the procedure by which these rights and liabilities are enforced"; and a further paragraph on the same page shows that the rights of an individual in reference to the state, as well as in reference to officials representing the state, are also included in Mr. Dicey's understanding of the term *droit administratif*.

From this description or definition two things appear: first, that this *droit administratif* is law — French law, to be sure, but still law — according to which certain rights and liabilities are determined; second, that these rights and liabilities are the same as those which have in this country been considered to be so separate and distinct from ordinary rights as to make desirable their separate treatment and study. The latter appears from the fact that a volume dealing with the rights and liabilities of public officers has been published and is widely used and cited in this country; and this same heading, as a distinct title of the law, is also to be found in the English digest.

Considering these matters, we may, after reading Mr. Dicey's definition of *droit administratif*, approach that subject with less apprehension than his introductory statements would be likely to create, especially his preliminary statement¹ that "this scheme of so-called administrative law is opposed to all English ideas," and with a feeling that we may find in the *droit administratif* of France a division of the law which to a certain extent we have already recognized.

After thus defining *droit administratif*, Mr. Dicey alleges² that any one who considers its nature with care, "or the kind of topics to which it applies, will soon discover that it rests at bottom on two leading ideas alien to the conception of modern Englishmen."

"The first of these notions is that the government, and every servant of the government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the state does not, according to French ideas, stand on anything like the same footing on which he stands in dealings with his neighbors."

¹ P. 322.

² P. 327.

The statement contained in this paragraph I believe to be in the main correct; and I have no intention of questioning the accuracy of Mr. Dicey's statement that this notion is alien to the conceptions of modern Englishmen. But if he means to suggest, and it seems to me that this is his meaning, that this notion is alien to the conceptions of modern Englishmen because it is not recognized by the law of England, or, in other words, that by the law of England the existence and extent of the rights, privileges, and prerogatives of the government as against private citizens are to be determined on the same principles and the same considerations which fix the legal rights and duties of one citizen towards another, he has evidently misapprehended the law of England.

A few elementary cases will serve for illustration.

A peace officer without a warrant arrests M. on suspicion of having committed a certain felony. A private citizen without a warrant arrests N. on suspicion of having committed the same felony. In fact, no such felony had been committed by any one. M. brings suit against the officer, and N. brings suit against the citizen who arrested him. The principles which govern in the action brought by M. are not the same as those brought by N.,¹ and Mr. Dicey certainly would not contend that the officer's liability to M. was to be determined by the same rule as that of the private citizen to N.

Furthermore, is it not "true, that in cases of grants by the Crown, they are construed favorably for the Crown, and that the usual rule for the construction of grants as between subjects is inverted"?²

An English man-of-war, owing to the negligence of her commanding officer, runs into and damages a vessel owned by a private individual. If the offending vessel had been owned by a private individual, she might, and in certain cases her owner might, have been sued for the injury caused by the neglect of her commanding officer. In an action against a vessel of the state the only remedy the English and American law recognizes is a suit against the commanding officer. Finally, what right of action against the state or the crown has the private citizen in England? Has he any other remedy than that given by the petition of right, which is a peculiar form of procedure, and is it not well settled

¹ *Samuel v. Payne*, 1 Doug. 359.

² *Attorney-General v. Ewelme Hospital*, 17 Beav. 366, 388.

that no petition of right can be maintained when the claim against the state is based on the tortious act or omission of a servant of the crown?¹

Then there is the Public Authorities Protection Act, 1893,² giving to the public official in England when sued by a private citizen the benefit of a special (six months) period of limitation, and penalizing the citizen who may have been unsuccessful in such suit, by the imposition of costs taxed as between solicitor and client; and the long schedule of repealed acts appended to this enactment shows how numerous have been the instances in which English law has given to the public official a protection against suits which the private citizen does not enjoy.

It would seem, therefore, that, if true of France, it is also true of England, that the extent of the rights, privileges, or prerogatives of the government as against the private citizen is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another; and it is also true of England, as well as of France, that an individual in his dealings with the state does not stand on anything like the same footing that he does in dealing with his neighbors, and one must conclude that if this notion is alien to the conceptions of modern Englishmen, it can be only because of their lack of familiarity with the law of their own country.

Mr. Dicey is, of course, aware of these matters. Indeed he expressly refers to some of them,³ namely, the petition of right and the enactments protecting public officials from suit, as "faint traces in the law of England of" some such principle as "the idea that when questions arise between the State or, as we should say, the Crown, or its servants and private persons, the interests of the government should be in any sense preferred or the acts of its agents claim any special protection." They are, however, but "faint traces," so faint as to make no impression on the minds of Englishmen, who apparently, according to Mr. Dicey, in spite of these rules and enactments, still cling to the delusion that in their dealings with the crown and with public officials they stand on the same footing that they do in dealings with their neighbors.

The fact that an individual in this country does not in his dealings with the state stand on anything like the same footing on

¹ *Canterbury v. The Attorney-General*, 1 Phil. 306; *Tobin v. Queen*, 16 C. B. N. S. 310.

² 56 and 57 Vict., c. 61.

³ P. 341 note.

which he stands in dealings with his neighbors, is too well known and recognized to require any citation or authority in its support. The well-known exemption, both of the United States and of the several states, from suits by their citizens, except by their express consent, given only by their legislative departments, is perhaps as striking an instance of it as any, and equally well known is the limited extent to which such consent has been given.

The first of the ideas, then, on which the *droit administratif* of France rests is one which is familiar to every lawyer in this country, and should, one must suppose, be no novelty to those of England.

"The second of the general ideas, on which rests the system of administrative law, is the necessity of maintaining the so-called separation of powers," according to Mr. Dicey,¹ or, as we should phrase it, the necessity of maintaining the proper division of the powers of government into legislative, executive, and judicial.

We can readily understand how this idea would be alien to the conceptions of modern Englishmen, whose idea of a constitution may be supposed to be the so-called constitution of Great Britain; but to us Americans, in whose written constitutions this doctrine of the separation of the powers of government has found such marked expression, and with whom it is to-day a recognized doctrine, politically observed and judicially enforced, the idea will not be unfamiliar. This is not to say that we necessarily make the same application of the doctrine, or deduce from it the same conclusions as do the French, any more than it follows that because we too recognize that a state in its dealings with its citizens should not be governed by the same rules as govern the relations of those citizens with one another, we necessarily have the same conceptions as they have of what should be the proper rules of law governing the relations of the state and its officials to the private citizen; I contend only that the idea of special and peculiar rules to govern those relations, and that of the necessity of the separation of the powers of government, are certainly not strange to us, and that a theory of administrative law which is based on these ideas rests in substance on bases which we also have recognized and adopted.

Let us next examine whether Mr. Dicey's exposition of the *droit administratif* is, in the main, an accurate one, — not neces-

¹ P. 328.

sarily one of absolute accuracy of detail, for it would be unfair to demand such accuracy in a statement which purports to set forth only the general principles of the subject, but simply whether or not it is one of substantial accuracy in the statement of those general principles.

Mr. Dicey remarks¹ that the second of the leading characteristics of French administrative law is "that the ordinary tribunals have, speaking generally, no concern with any matter of administrative law." It is perhaps ungracious to quarrel with a statement guarded by the phrase "speaking generally"; but in view of the definition of administrative law which Mr. Dicey has already given, the statement appears to me to be inaccurate and likely to mislead, even after giving all due effect to the phrase "speaking generally."

It must be remembered that among other things which administrative law includes are the civil rights and liabilities of private individuals in their dealings with the state and with officials as representatives of the state; and as in France a fairly large part of those dealings falls within the jurisdiction of the ordinary courts, and is governed in many cases by no special and peculiar rules, it seems to me that attention should be called to this feature of the French law, in correction of Mr. Dicey's general statement.

For instance, Mr. Dicey says: ²

"If a Minister, a Prefect, a policeman, or any other official, commits acts in excess of his legal authority, as, for example, if a police officer in pursuance of orders, say from the Minister of the Interior, wrongfully arrests a private person, the rights of the individual aggrieved and the mode in which these rights are to be determined is a question of administrative law."

It is not quite clear just what idea the learned author meant to convey by this statement. It may be intended simply as an example to illustrate the definition of administrative law which just precedes it, and if so, is unobjectionable, as no one denies that administrative law does include the rules according to which such rights are determined. But the author probably intended by it to convey the further idea that those rights, etc., were to be determined in some other way than by the ordinary course of law and in the ordinary courts.

A note to that page, in which Mr. Dicey takes pains to dis-

¹ P. 329.

² P. 326.

tinguish between two classes of acts of officials, for one class of which they are suable in the ordinary courts while for the other the only remedy of the person aggrieved is by suit against the state in the administrative courts, indicates that when he wrote the statement above referred to, he was under the impression that in stating that certain rights and the mode in which those rights are to be determined is a question of administrative law, he was stating in substance that those rights could form the subject of a suit in the administrative courts only, and the statement has been frequently understood as having that meaning.

That Mr. Dicey believed, when he wrote this chapter, and intended that his readers should believe, that the only remedy given in France to a private individual aggrieved by the illegal act of an official was by suit in the administrative tribunals, clearly appears from this further statement of his: ¹

“The assertion, however, that where an official in the discharge of his official duty injures a private individual, the person wronged cannot claim redress from the ordinary judges, does not mean or imply that a person who is thus aggrieved, say who is wrongfully arrested by a policeman acting under orders, or libelled in an official notice issued by a mayor, is without a remedy. The incompetence of the civil tribunals means, only, that, where any wrong has been done through an official proceeding, redress must be sought through the proper official authorities, or, as they are called, the administrative tribunals (*tribunaux administratifs*).”

As these statements are hopelessly at variance with the decisions of the courts, it seems proper to direct attention to their incorrectness.

Let us take the typical case put by the learned author, that of the wrongful arrest of a private person by a police officer in pursuance of orders from the Minister of the Interior.

In the first place, violation of the rights of personal liberty committed by a public functionary is a crime.² The administrative courts have no criminal jurisdiction, except for certain petty offenses relating to highways, therefore the penal liability could not be enforced in the administrative courts. Persons accused of crimes are tried in the assize courts, which are judicial tribunals and not administrative ones.

It is true that a minister may, by process analogous to our impeachment, be placed on trial before the Senate by the Chamber

¹ P. 330.

² Code Penal, Art. 114.

of Deputies for crimes relating to his functions, but Mr. Dicey would probably not contend that in such case the Senate was an administrative court.¹

As to the civil action for damages to which the private individual might be entitled in such case, whether in connection with the criminal prosecution or independently thereof,² this also would be triable in the judicial courts, — either the assize court in case it was made part of the criminal proceedings, or in the ordinary civil courts in case it was instituted independently thereof.

Let us illustrate this doctrine of the jurisdiction of the ordinary courts in such cases by a few actual decisions.

A prefect who had caused a private individual to be arrested (and as to the lawfulness of the arrest no question was made) was held personally liable to the person arrested for having illegally prolonged the detention of the prisoner, and this liability was enforced by suit in the ordinary courts, and the judgment against the prefect was upheld by the Court of Cassation.³ Suits against minor officials for illegal arrest or detention have frequently been maintained in the ordinary courts. But perhaps the most instructive case is that of *Usannaz-Joris c. Prefect de la Savoie*,⁴ in which a prefect was held personally liable in damages in a suit in the ordinary courts for having seized political circulars intended to aid in re-establishing the monarchy in France. Although this was a case of illegal seizure of the property and not of the person of the plaintiff, it presents these features of special interest, — that the act of the prefect was done pursuant to the express orders of the Minister of the Interior, whose conduct in the matter was later approved by vote of the Chamber of Deputies and that the decision upholding the competency of the ordinary courts was rendered by the Tribunal des Conflits, whose members, as Mr. Dicey tells us,⁵ are "inclined to consider the interest of the state, or of the government, more important than strict regard to the legal rights of individuals."

The opinion of the Tribunal des Conflits, holding that the regular courts had jurisdiction of the action for damages brought against the prefect, states expressly that the character of the seizure was not altered by the fact that it was ordered by the Minister of the Interior for a political purpose, and that if the government

¹ Const. Law, 16 July, 1875, Art. 12.

² Code Penal, Art. 117.

³ *Valentin c. Haas*, Dalloz, 1876, I. 289.

⁴ Dalloz, 1890, III. 65.

⁵ P. 334.

has the duty of ensuring the safety of the state and putting down any attempt to overthrow the republic, it is not invested for this purpose with any powers except those conferred by law. Such a decision certainly bears no indications of having emanated from a court whose members were "inclined to consider the interest of the government as more important than strict regard to the legal rights of individuals."

At the same place in the report may be found the decisions in the suits against the Prefect of Police of Paris and the Prefect of le Loiret, for the recovery of the property seized by them pursuant to the same directions of the Minister of the Interior, and in which the same doctrine is affirmed.

In view of these three decisions it is difficult to understand how Mr. Dicey can state, as he does,¹ that "we may further draw the general conclusion that under the French system no servant of the government who without any malicious or corrupt motive executes the orders of his superiors, can be made civilly responsible for his conduct."

That the orders of the Minister of the Interior are no protection to an official when prosecuted for violation of a provision of law having a penal sanction, appears from the case of *Vincent c. Fosse*,² also decided by the Tribunal des Conflits, upholding the jurisdiction of the Tribunal Correctionnel of Rheims to sentence and fine an under prefect and two policemen for defacing the election posters of General Boulanger, although the prefect showed that what they had done was by his direction and pursuant to orders received from the Minister of the Interior.

Our author's statement in regard to the other case he mentions, that of "a libel in an official notice issued by a mayor," would seem also to be inaccurate. Here, again, the Tribunal des Conflits, whose members, as Mr. Dicey tells us,³ "are swayed by official sympathies," has decided that the mayor may be held personally liable for such a libel at the suit of the person aggrieved brought in the ordinary courts.⁴

The foregoing decisions would seem to establish the ability of the members of that high tribunal to overcome in certain cases both their inclination to favor the government and their official sympathies.

So much for suits against officials personally. As regards those

¹ P. 339.

² Dalloz, 1891, III. 31

³ P. 334.

⁴ *Lalande c. Peynaud*, Dalloz, 1899, 3. 93.

against the state, we find that for nearly a century the taking of land for public purposes by right of eminent domain, and the assessment of damages for such taking, has been entrusted to the judicial tribunals. This includes what is known as indirect taking, *i. e.*, "where administrative acts have for their indirect result the dispossession of an owner for the benefit of the administration."¹ Furthermore, all rights and liabilities of the administration or state as owner or manager of its private estate are (unless they relate to public works) decided by the ordinary courts and according to the rules of their common law. An interesting instance of the liability of the state, as owner of buildings belonging to its private estate, is found in the case of *Dessauer v. The State*,² in which an action was maintained in the ordinary courts against the state as owner of the theater known as the Opera Comique for loss of life occurring when that building was burned.

We thus see that there are many matters which fall within the definition of administrative law given by Mr. Dicey, which are in France within the jurisdiction of the ordinary tribunals. Furthermore, Mr. Dicey says,³ that the ordinary judges are incompetent to pronounce judgment on any administrative act, that is, on any act done by any official, high or low, *bona fide* in his official character, and "that the judges cannot pronounce upon the legality of decrees issued by the President of the Republic."

That these statements are inaccurate appears from the right, possessed by the ordinary courts in France, of passing upon the legality of regulations or ordinances made by the administrative authority, whether mayor, prefect, or head of the state. The ordinary courts in France have not the power of annulling such regulations and ordinances, any more than our courts in this country have the power of annulling or cancelling unconstitutional laws. That power in France is possessed only by the highest administrative tribunal, the Council of State, but the ordinary courts have the power of refusing to enforce all such regulations and ordinances, or give effect to them, if, when their meaning is clear, the courts deem them unauthorized or illegal—much the same power as that possessed by our courts regarding unconstitutional laws. So that it would seem that many matters which clearly fall within Mr. Dicey's definition of administrative law are, in France, within the

¹ 1 Laferrière 542.

² Dalloz, 1899, II. 289; s. c. (Cas'n) Dalloz, 1902, I. 372.

³ P. 330.

jurisdiction of the ordinary courts, and are therefore not within the jurisdiction of the administrative courts; and this fact is entirely ignored in his chapter.

His statement regarding the administrative courts and their functions appears to be open also to a somewhat analogous criticism. Whether or not his exposition of the character and composition of these courts be a correct one may perhaps best be judged from an examination of his statements regarding the Tribunal des Conflits, the court which is charged with the duty of deciding whether a given matter falls within the jurisdiction of the ordinary courts or that of the administrative ones.

A correct conception of the composition of that court is the more important as, according to Mr. Dicey,¹ the true nature of administrative law depends in France upon the constitution of the Tribunal des Conflits. He thereupon poses the question, "Is this tribunal a judicial body or an official body?"

Apparently, if this Tribunal des Conflits is judicial, so also is French administrative law; but if it prove to be an official body, then also must administrative law in France be deemed official. Mr. Dicey hesitates to give a decisive answer to his question. Evidently that "tribunal" has certain claims to be considered a judicial tribunal, though Mr. Dicey does not inform us what these claims are, but gives, however, as his conclusion, "that, subject to the hesitation that becomes any one who comments upon the effect of institutions which are not those of his own country, an observer may assert with some confidence that the Tribunal des Conflits is at least as much of an official as of a judicial body." If, then, Mr. Dicey's previous statement is borne in mind to the effect that "the true nature of administrative law depends in France upon the constitution of the Tribunal des Conflits," it would seem to follow that the same conclusion must be formed regarding the nature of administrative law, namely, that it is "at least as much official as judicial." This, however, is not the conclusion which he draws. According to him,

"It follows therefore that the jurisdiction of the civil tribunals is, in all matters which concern officials, determined by persons, who, if not actually part of the executive, are swayed by official sympathies, and who are inclined to consider the interest of the state, or of the government, more important than strict regard to the legal rights of individuals."

¹ P. 333.

This is the statement to which reference has already been made, when considering the decisions of that tribunal holding prefects and others liable for having infringed the rights of the private individual, though their acts were committed at the behest of the Minister of the Interior. As a conclusion, it does not seem to follow from his premises, and if we examine what the facts are regarding the composition of the Tribunal des Conflits, the conclusion will, I think, appear the more surprising.

The President of the Tribunal des Conflits is the Minister of Justice, *ex officio*. The remaining members are chosen, one-half from the Council of State and one-half from the judges of the Court of Cassation, which in the appendix¹ Mr. Dicey refers to as the "highest civil court in France."

Does not Mr. Dicey's statement regarding the Tribunal des Conflits ignore entirely the fact that one-half its members are taken from the "highest civil court in France," and could he have made, with any show of plausibility, the assertion above quoted, had he disclosed that fact?

This brings us to the matter which is perhaps of most importance in forming any judgment regarding the administrative law and administrative tribunals of France, and the entire omission of any reference to which from Mr. Dicey's chapter seems to me its greatest defect.

That matter is this, that as a complement of the exemption from suit enjoyed by government officials in France on account of acts, even negligent and improper ones, within the limits of their functions, the state itself in many cases is held to be liable and may be sued by the private citizen who claims to have been injured by such negligence, or improper act, of the government official. No comparison between the law of England and the administrative law of France can be considered as fair, which directs attention solely to the exemption from suit enjoyed by certain government officials in France, an exemption which similar officials do not enjoy in England, and fails to mention the right of the citizen in France to sue the state for the act of that official, a privilege which the private citizen does not enjoy either in England or in this country. Among the leading cases on this point are the well-known Laumonier-Cariol decisions.

In 1872, in order to perfect its monopoly of the manufacture of

¹ Appendix 495.

matches, the French government had been given the power of acquiring by right of eminent domain the existing match factories. It occurred to the Minister of Finance that if there were any way of closing these factories and stopping their operation instead of taking them, quite a sum might be saved to the state, as such closing, if it could be maintained, would answer every purpose of the state and avoid the necessity of any payment. Recalling that the prefects had certain police powers over such factories, he directed them to close certain of them, ostensibly for sanitary reasons, but actually for the purpose of saving money for the government. A prefect made such an order regarding the plaintiff's factory, but on appeal to the Council of State, his order was annulled on the ground that he had used his power improperly.¹ An action was then brought before the judicial tribunals by the owner of the factory against the prefect and the Minister of Finance, pursuant to whose direction the prefect had acted. This action was held not to be maintainable, on the ground that the action was in reality brought against the state in the person of its agents, and that such an action fell within the jurisdiction of the administrative tribunals.² An action was then brought against the state, and 53,500 francs damages awarded to the owner for the loss of profits during the illegal closing of the factory by the order which had been annulled, and this in addition to the damages which he received on the taking of the factory by the state.³

There are many other instances of a liability imposed on the state in France, not by statute, but by the "case law" of the Council of State, in cases where, by the law of England and of the United States, no such remedy would be given the person injured. Among these may be mentioned the liability of the state to make good injuries received by vessels, owing to neglect of harbor authorities to mark properly the dangers to navigation, and the liability to indemnify the owners of vessels injured by collision with government vessels through the negligence of the officers of the latter.

The foregoing examples are by no means all of the statements in Mr. Dicey's chapter which to the writer appear calculated to give an erroneous impression of the administrative law of France

¹ It is worth noting in this connection that an attempt to have a similar order held invalid by the judicial tribunals, including the Court of Cassation, had failed. Dalloz, 1875, I. 495.

² Dalloz, 1878, III. 13.

³ *Ibid.*, 1880, III. 14.

and to call for correction; but enough has perhaps been said to serve the purpose of this article, namely, to bring to the attention of those interested in the matter the danger of accepting Mr. Dicey's exposition of the subject as correct.

No better confirmation of this view could be had than that afforded by Mr. Dicey's own explanation of the error into which he was led, when he undertook the study of the subject, which explanation is found in Note X of the appendix,¹ entitled "English Misconception as to *Droit Administratif*," where he tells us that "the nature and the very existence of *droit administratif* has been first revealed to many Englishmen, as certainly to the present writer, by the writings of Alexis de Tocqueville, whose works have exerted in the England of the nineteenth century an influence comparable to the authority exerted by the works of Montesquieu in the England of the eighteenth century. Now Tocqueville by his own admission knew little or nothing of the actual working of *droit administratif* in his own day." This being the case, it is not surprising that Mr. Dicey's Chapter XII, as it appeared in the earlier editions, called forth protests from French lawyers of eminence, in deference to which he, as he tells us,² has in one or two instances modified the language of the chapter.

The matter of surprise is, rather, that, having discovered his error, and having learned that the *droit administratif* of the close of the nineteenth century which he was attempting to describe to his readers differed materially from "the *droit administratif* of 1800 or even of 1850,"³ that De Tocqueville, from whom he had derived his view of the earlier law, "knew little or nothing of the actual working of *droit administratif* even in his own day," and, as Mr. Dicey shows us,⁴ gave a prejudiced and biased account of the little or nothing he did know, Mr. Dicey should not have entirely rewritten his Chapter XII, so as to bring his exposition of *droit administratif* more into accord with the contemporary authors to whose works he refers his readers⁵ for information on *droit administratif*, in which reference I find myself at last in hearty accord with Mr. Dicey.

Undoubtedly one who has any familiarity with that subject will see, in Mr. Dicey's two notes⁶ in the appendix, a virtual retrac-

¹ P. 490.

² P. 322 note.

³ P. 491.

⁴ Pp. 490-491.

⁵ Pp. 322 note, 485 note, 492. The authors referred to are Aucoc, Laferrière, Hauriou.

⁶ X and XI.

tion of most of the statements made by him in the chapter under discussion, and retained, even in its amended form, in the sixth edition, but the ordinary reader is not much aided thereby. The erroneous impression he is likely to receive from Chapter XII will probably not be removed by reading the notes in the appendix. It would certainly be preferable that the chapter should be rewritten so as to embody the corrections found in the appendix, and I trust this may prove to be the case in the next edition, as I cannot believe that Mr. Dicey can regard the way in which the matter is now presented as doing justice to his present views regarding *droit administratif*.

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THE GENESIS OF THE CORPORATION.

A FEW years ago the writer became interested in the trust problem, and after some study of the subject reached the conclusion that the corporation furnished the only means by which trusts were able to maintain their existence.¹ This naturally suggested an examination of the contrivance which was sufficiently convenient and effective to accomplish such large results. The process of forming a corporation was of course familiar, but on close inspection the thing itself seemed to merit investigation. Several persons associate themselves and comply with certain forms prescribed by law, and the result is something having an identity and existence entirely independent from these persons, and with rights, powers, and duties of its own. All the familiarity in the world with this process does not render the result other than remarkable. Nor is the phenomenon clearly explained by the well-known statements that this mysterious something is "created by the sovereign power," and that it is "a fictitious or artificial person."² Inevitably the inquiry arises whether the corporation represents a natural privilege, or whether it is an arbitrarily constructed species of machinery. This in turn suggests further questions: Where did the corporation come from? Who invented it? On what basic principle does it rest? In the ultimate analysis what is the corporate idea? In considering these questions it is the single endeavor of this paper to arrive at the inherent nature of the corporation. It is proposed first to discuss the matter in the abstract, and then to illustrate that discussion by specific examples.

The germ of the corporate idea lies merely in a mode of thought; in thinking of several as a group, as one. This mental process, familiar as soon as there was any conscious thought, is so nearly elemental in its nature that it has been said to defy analysis.³ Nevertheless, as individuals are the primary units from the point of

¹ 16 HARV. L. REV. 791.

² Marshall, C. J., in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; Cal. Civil Code, § 283; Georgia Code, § 1836.

³ Morawetz, *Law of Private Corporations*, § 1, note.

view of logic, if not of history,¹ a thought which embraces several individuals must be susceptible to some extent of explanation. It is the recognition of a fact, namely, that a certain number of persons are seen or heard or in some way appear as a body, as one; they are perceived by some one or more of the senses to manifest a certain cohesion. The underlying cause or motive force which produces this perceptible cohesion is that each of the individuals in question bears precisely the same relation to some aspect or phase of existence; each has an identity of relationship to a common influence or factor. This common factor may be trivial and of momentary effect, or it may be of permanent and vital significance. For example, it may consist in ties of blood or place of residence, or it may be merely the desire to see a passing street parade. In other words, there are groups of all sorts and degrees. The persons gathered to chat on a street corner, the men who row in a college boat, the statesmen who legislate at Washington, a crowd, a crew, a congress, are groups created, it is true, by accident, and evanescent, but different in degree only from such groups as families and tribes, the members of which are considered as one because of a cohesion due to a continued identity of relationship. The mental process which we have tried to analyze, expressed in written or spoken language, results in a word which stands for several but which is itself in the singular number. We suggest therefore, without fear of being accused of confusing cause with effect, that a clear, practical definition of a group is this, namely, such a collection of individuals as may be represented by a word of the singular number. That this is not a wholly accurate test is admitted; that it constitutes a good working rule is shown by the following examples: crowd, crew, team, court, board, class, regiment, army, flock, herd, audience, congregation, party, cabinet. For the persons stopping over night at a hotel, the passengers on a train, the guests at a ball, collections of individuals not manifesting a perceptible cohesion, there is no adequate word of the singular number.²

Having seen that the basis of all groups is merely a mode of thought, let us analyze the process by which some groups become

¹ Sir Henry Maine intimates that the family, clan, and tribe were recognized entities of society before individuals were. *Ancient Law* 258.

² These collections of persons certainly have an identity of relationship to a common factor. It seems to the writer, however, that in the examples cited it does not produce a perceptible cohesion which leads us to think of them as groups.

more important than others. Because several individuals are perceived to manifest a certain cohesion in respect to a single episode, as in the case of a crowd on a street corner, we think of them and name them as one. Unless something further happens, that is the end of it. Frequently, however, something further does happen, and it is this: instead of being perceived as one in a solitary instance, the same several persons act or appear together on various occasions during a considerable period of time. A simple example is a quartette of musicians. The oftener this happens, the more the oneness of these same several persons is emphasized. It is necessary to think of them as a group, not once, but frequently, perhaps continuously; the group becomes established in the minds of others as something definite and lasting, and finally as something independent of the individuals who compose it. This independence is of vital importance, for it means that the persons composing the group may change and yet the group continue. A regiment of soldiers is an example of this. As the group performs acts, it demands recognition as such, not in the mind merely, but in the conduct of others towards it. The several individuals composing the group are not only thought of and named as one, but of necessity are treated as one also. The oneness, the something produced by the cohesion of several,¹ has become something which must be dealt with in practical affairs and which under certain circumstances must be recognized by the law.

The extent to which a group is treated as one by those dealing with it depends entirely on the demands of practical convenience. Very many groups which maintain a fairly active existence require recognition as such in hardly more than nomenclature, recognition which is accorded to the simplest group. Take, for

¹ It seems proper to speak of the oneness produced by several as something independent, having an existence of its own. It is proper, however, simply because the demands of convenience are so nearly, if not quite, peremptory that they must be complied with or the joint action of several cease to cut any figure as a practical matter. As far as tangible facts go, nothing is produced from the several in a group. In the last terms of accuracy a group name is merely a short way of describing several persons, their relation to one another, and the effect they have on outsiders. So the word "corporation" is, in strict accuracy, nothing but a short way of describing several persons who have peculiar attributes and definite, though complicated, relations with one another and with outsiders. If, however, every time the persons in a corporation were dealt with we had to think and say several pages of words, it would be impossible for them to become real factors in daily life in their group capacity. The oneness as a practical matter is nearly as real as the several and is but one step beyond them.

example, a college football team. It is a true group, something different from any or all of its members. During the season the eleven players are thought of as one, in practice and matches are treated as one, and as one may go down to posterity as the best or worst football team ever known. But this is the only recognition this sort of group demands. It does not touch life on its practical side. It is not apt to hold property, nor likely to get into controversies which require it to sue or be sued; it has no use for legal rights, nor need for a definite status in business or law. Some groups which are active in practical affairs are treated by the law merely as so many individuals. A partnership, for example, owns property and performs acts, but in contemplation of the law does so through its members. Facts do not require recognition of the oneness of these groups to be carried to the point of recognition in law. The demands of convenience are satisfied by the law as to co-ownership. Other groups which wage war, negotiate treaties, and make laws, such as nations and states, touch life on vital points, are of necessity treated as groups in many and important affairs; and therefore the oneness of these groups must be established on an approximately exact or at least a well-defined basis. In other words, without artificial aid such as is accorded by arbitrary command of a sovereign power, that is, by a statute, a group receives just the degree of recognition which ordinary every-day circumstances make necessary. The true corporation is nothing but a marked instance of such recognition in a high degree.

It is apparent that the same fertile germ lies behind all joint action and endeavor. The corporation, though representing perhaps the most advanced attainment of the group idea, is only one manifestation of a development which has gone on in every country under the sun having a claim to be called civilized.¹ Obviously, and this cannot be too strongly insisted upon, it was not the invention of any one man or one people. No philosopher, statesman, or lawyer sat down, cogitated, and said, "It would be convenient to give several persons acting together certain attributes and call them a corporation." Nor is the cor-

¹ "Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come or are coming into existence." Pollock and Maitland, *Hist. of Eng. Law*, 2d ed., i. 486.

poration in its essentials peculiar to any country or any people, although the contrary view has been advanced by many learned writers. Blackstone, for example, says of corporations: "The honor of inventing these political constitutions entirely belongs to the Romans."¹ A study of the code and digest unquestionably had an influence on the form of the corporation of to-day, but the corporation existed in England long before Roman law-books were known in that country. There as everywhere it was the result, not of imitation, but of evolution, — a natural, though hardly inevitable, manifestation of the group idea.²

It is time to test our abstract discussion by the examination of facts. The truth of our inferences could be proved by the history of numberless groups which have become active at various times from the days of the Old Testament to the present. The practical importance of the oneness of groups could be shown specifically by presenting the characteristic development of the group idea manifested by the universities³ of the middle ages, and by the great livery companies of London.⁴ Naturally, however, our happiest illustration, both of the general development of the group idea and of the necessity for establishing it as something definite, lies in the story of the groups which were the immediate predecessors of the corporation.

The course of development may first be briefly indicated in general terms. When certain groups became active factors in daily life, especially in trade matters, when as groups they were accorded legal rights and were owners of property, it became necessary as a matter of practical convenience to put the several persons in their group capacity on a definite basis which could be dealt with in business and in law. The oneness, the indefinite something which is the essence of every group, in these particular groups became so accentuated and so important in respect to the most usual and practical affairs of life that it fairly vociferated for

¹ Sharswood's Blackstone's Commentaries 468.

² All that we have said as to groups might be true and yet never a corporation have come into existence. There may be much associate activity not in the corporate form.

³ Masters and scholars received privileges as a class or unit. Corporations, their Origin and Development, i. 257 *et seq.*

⁴ Members received by grant from the king privileges which they held as a body. See Charter of Edward III. to the Fishmongers; Charter of Richard II. to Skinners; Charter of Richard II. to the Merchant Tailors, which says: "We . . . do for us and our heirs as much as in us is by tenor of these presents grant and confirm all and singular the premises to the aforesaid Taylors and Linen Armourers and their successors forever." And generally Stubbs, Select Charters.

complete recognition. Not from fanciful considerations, but in response to the stern insistence of actual facts, it became necessary "to give to airy nothings a local habitation and a name."

The corporation in England was the joint result of certain groups in ecclesiastical life and certain other groups active in temporal affairs. For centuries the development of each was wholly independent of the other, and we may briefly consider each in turn.¹

The starting-point of the corporation in temporal affairs was simply that certain people lived near one another. In at least this aspect of life they had an identity of interest. At first there was nothing but the fact of propinquity. There were no rights or duties except those appertaining to the several persons who lived in the locality as individuals. What they owned they owned as individuals, and what they did they did as individuals. They created towns and villages. Some of these settlements became more densely populated than others, and this was, at first at least, what chiefly distinguished a borough, the group which directly led to the corporation, from the ordinary village. This distinction was familiar at least from the early years of the thirteenth century. All sorts and conditions of people resorted to the larger center. Its population became heterogeneous. Some inhabitants held their land directly from the king, some from nobles; the borough would not become the property of any one person. Nothing intervened between it as a whole and the king as overlord of all the realm.²

Along with increased population, partly as cause and partly as effect, went increased trade both among the inhabitants themselves and with others. Life became more active, more complex; there was more contact with the rest of the world. Then, too, in these larger settlements the instinct for local self-government awoke and developed. It amounted to more to be an inhabitant of a large

¹ The facts which are hardly more than suggested in the following pages are treated at length by Pollock and Maitland in their *History of the English Law*, 2d ed. in the chapters called "The Borough" and "Corporations and Churches." The writer cannot too highly express his admiration for the breadth of treatment, the keen thought, the wonderful industry indicated by these chapters. See also Stubbs' *Constitutional History*; Gross, *The Gild Merchant*; Adler, *A Summary of the Law of Corporations*; Davis, *Corporations, their Origin and Development*. It is obvious that this article does not pretend to be a work of original research; the writer nevertheless has verified statements as to facts from primary sources.

² Pollock and Maitland, *Hist. of Eng. Law*, i. 637-638.

center than a small one. The larger place inevitably felt its strength and importance, and as a consequence reached after what might add to the power and comfort of the persons who were and should become its inhabitants. It wanted and needed special privileges. What was equally important, it was in a position by force of its numbers and wealth to secure them from the king.

The franchises acquired by the borough from the king were principally three, namely, right to hold its own courts, right to its own customs, and freedom from toll.¹ The last was the most important in bringing out the oneness of the borough, and should receive a word of explanation. It was exemption from certain mercantile taxes or imposts which were collected all over England either by the king, through his agents, or by nobles who had acquired the right from the king. The nature of these taxes is sufficiently indicated by their names: duty on buying and selling, toll exacted in markets, passage money on merchants visiting fairs and markets, toll for maintenance of bridges, stallage, or money paid for permission to have a stall in a fair; fee for permission to trade. They constituted a considerable burden on the merchants of a community, especially when their enterprises called them to other parts of the country than their own. As a part of the grant of freedom from toll, the king gave to the inhabitants of the borough, the burgesses, the right to farm their own borough. That is, he substituted for his own toll-gatherer the burgesses, who paid him a fixed annual sum in lieu of toll. He also exempted them from paying toll elsewhere in England. Usually accompanying these privileges was the right to form a merchant gild,² for the purpose of better securing the right of freedom from toll. A merchant of the borough traveling to other places and standing boldly on his borough rights needed the support of an active, prudent organization. Besides, the right to take toll from strangers required to be fearlessly exercised and jealously guarded. These were the primary functions of the gild merchant.³ The possession of free-

¹ There were many and various franchises granted. See, for privileges granted to boroughs, Charter from King John to Nottingham in 1200; from Henry II. to Lincoln in 1189; from John to Burgesses of Helleston in 1201; from Henry II. to Winchester; and generally Stubbs's *Select Charters*.

² There were other kinds of gilds long before privileges were ever granted by the king to a borough. The festive and religious gild may be traced back to the days of heathenry. Pollock and Maitland, 2d ed., i. 639; Gross, *The Gild Merchant* i. 174 *et seq.*

³ A borough had two organizations, gild and governmental; each was closely con-

dom from toll with the accompanying right to have a merchant gild naturally increased the activity of the borough in degree and in variety.

These franchises came from the king, and they came in the form of a grant.¹ The operative words of a typical charter were as follows:

"John, by grace of God, King, etc. Be it known that we have granted and by our present charter confirmed to our burgesses of Ipswich our borough of Ipswich with all its appurtenances and all its franchises and freedom from imposts, to hold of us and our heirs, to themselves and their heirs, they paying into our exchequer each year on the feast of St. Michael, in behalf of the aforesaid Ipswich, the just and customary rent."²

There was nothing in the grant which expressly brought a legal person into existence, nothing which incorporated the borough. But in the very gift of these privileges there lurked a problem which sooner or later would require solution. Who really owned these franchises? No one asked the question at this time, and probably it was not the subject of much conscious speculation. Without doubt the offhand idea of the king was that the grant was to the individual burgesses living in a particular place; of the burgesses, that they received the privileges as individuals. A second thought on the part of either would hardly have sustained the offhand idea. Clearly the oneness of the burgesses was recognized, at least by implication.

Not only was the possession of these privileges from the first hardly to be accounted for on the theory of co-ownership of many individuals, but little by little this kind of property became subject to incidents wholly irreconcilable with any such theory. The burgesses died, and the privileges continued to be held by the burgesses who came after them.³ The king, as the punishment for the act of

nected, but not identical. "The Gild Merchant was a very important, but only a subsidiary part of the municipal administrative machinery, subordinated to the chief borough magistrates, though far more autonomous than any department of the town government of to-day." Gross, *The Gild Merchant* i. 63.

¹ It was in form and reality a grant, although the analogy of the Magna Charta, which used the words "to all the free men of England and their heirs," might suggest that it was a local law.

² King John's Charter to Ipswich. Gross, *The Gild Merchant* ii. 115.

³ The preamble to Statute 15 Richard II., c. 5 (1392 A.D.), recites that an extension of the provisions of the Mortmain Statute is necessary, "because mayors, bailiffs, and commons of cities, boroughs and other terms which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion."

one or more individuals, took away the franchises he had granted to all.¹ Sometimes the punishment continued after the old inhabitants had given place to new ones. The punishment fell not on persons, but on the community. The burgesses not only profited by their franchises, but had to maintain them. It was necessary to deal with this property in daily affairs, to defend it at law if need be. In 1200 Ipswich got a common seal, and other boroughs followed suit.² In 1225 the burgesses of Nottingham demised to the burgesses of Retford the tolls belonging to the former borough and arising within certain geographical limits at an annual rent of twenty marks.³ In grants from the king the phrase "and their successors, burgesses," began to supplant the phrase "and their heirs."⁴ In a word, the king treated the burgesses as a group, and the burgesses in respect to their property acted as a group. The group, and not the individuals, was the property owner.

To sum up: From the temporal development we get, by reason of the association of individuals in the same locality plus an active interest therein, especially in trade matters, a unit interest which demands and receives franchises and privileges which belong to the associated persons in a way not provided for by any of the existing theories of ownership. We get the fact of a oneness which has a place in business and law without the conscious recognition of its existence.⁵ The process was vague; it was not marked off by distinct steps. The oneness of the burgesses was there all the time, as it is in every group, but many years had to elapse and many unconsidered acts to be done before it emerged from the mist as something definite and real.

Meanwhile the group idea was developing in ecclesiastical life. For wholly different reasons religious groups were formed. There the association depended, not on accident of locality, but on the voluntary act of individuals. From the first there was a tendency of churchmen to come together. The basic doctrines of the Chris-

¹ Riley, *Chronicles of London* 11, 15, 18, 22; P. Q. W. 160. There is record that once in such a case the Londoners prayed that only the guilty might be punished. Riley, *Chronicles* 84.

² Gross, *The Gild Merchant* ii. 119, 121.

³ Pollock and Maitland, 2d ed., i. 95.

⁴ King John's charter for Waterford: *Chartae, Privilegia, et Immunitates*, Irish Record Commission 13. Cited in Pollock and Maitland i. 677. This was a step in advance, but the idea of plurality is still suggested.

⁵ Pollock and Maitland say the necessity for a new idea existed at least before the end of the thirteenth century. *History of English Law*, 2d ed., i. 687.

tian church require coöperation and also continuity of thought and effort. It was inevitable that churchmen should join together to spread their belief, to do works of charity, to study, to honor a favorite saint. Monasteries, convents, and chapters¹ were the result.

These religious groups did not touch life so closely on the practical side as did the borough. At first, at any rate, they were not property owners although they managed property. As a group they were not so likely to deal with others in respect to merely business affairs. Nevertheless the members of the group were closely associated. Joint action was required; meetings were held and votes taken. In particular the oneness of the ecclesiastical groups was from the first recognized as independent; that is, the personnel of the group changed, but the group went on.² As the property managed by the religious groups became more valuable, the oneness of these groups became something to be reckoned with in practical affairs.

To sum up: From the ecclesiastical development we get organizations of individuals formed for different purposes and by voluntary association, which have a continuous existence and which are recognized as units.

We have then a unit interest or oneness which, as exemplified by both temporal and ecclesiastical groups, owned or managed property, dealt with outsiders, — in a word, was an active factor in affairs. It was time that the indefinite something produced by the association of several be given a name and its status established.³ The facts called for a new legal theory. To construct one was not a simple matter. There was much blind groping after the nature of this indefinite something. For a time the idea naturally sug-

¹ Davis, in "Corporations, their Origin and Development," says that corporations may have their origin by means "of such changes in the supreme organization of society as to leave some of its groups, retaining their old organizations, in an exceptional relation to it." He instances cathedral chapters. This may be true as to corporations. Manifestly it cannot apply to the origin of simple groups.

² As to this, Bracton says (f. 374 b): "If an abbot, prior, or other collegiate men demand land or an advowson or the like in the name of their church on the seizin of their predecessors they say 'and whereof such an abbot was seized in his demesne,' etc. They do not in their count trace a descent from abbot to abbot, or prior to prior, nor do they mention the abbots or priors intermediate (between themselves and him on whose seizin they rely), *for in colleges and chapters the same body endures forever, although all may die one after the other and others may be placed in their stead; just as with flocks of sheep, the flock remains the same though the sheep die.*"

³ "The law is slowly coming to the idea of a corporation by dealing with corporations (if we may call them so) of very different kinds." Pollock and Maitland, 2d ed., i. 494.

gested by the analogy of the human body was applied to these groups. The chief officer, as mayor or bishop, was the head, and the members were the arms, legs, etc.¹ This was called the anthropomorphic theory, and for a long time obscured the true corporate idea.² Finally, however, the oneness of these groups was given a definite recognition, not as a real but as an ideal or legal person.

The conception of an ideal person having legal rights and duties was borrowed directly from the early English theory as to church ownership, a theory attained not without difficulty. In very early times, several centuries at least before the reign of Edward I., there were in England what were vaguely known as church lands.³ At first the land was given direct to God. Such a dedication came naturally and spontaneously. The Deity was vaguely conceived of as a property holder; the incidents of ownership were not considered. Sometimes the land was given to a saint;⁴ such a saint was frequently buried in a particular church and was supposed to protect and guard it. So little by little the saint and the church, the actual building, became merged in each other, and finally the church itself was thought of as a property holder. The institution, the structure of stone and wood, together with its spiritual attributes, was personified. About this time church lawyers, the canonists, discovered the *universitas* in the Roman law books and applied it to the church. The theory of an ideal person was attained.

Although the church was the property owner, the functions of ownership were necessarily performed by human beings, by the clergy. The personified institution could not collect moneys, nor make conveyances, nor bring and defend suits. The group of

¹ Abbot of Holme v. Mayor, etc., of Norwich, Y. B., 21 Edw. IV. f. 69. And see Y. B., 21 Edw. IV. f. 15, f. 68, per Vavisor.

² Pollock and Maitland, 2d ed., i. 491, 492, and citations of Year Books there given.

³ In the earliest Christian times in England when a man built a church on his land it was his church, just as a house or shed built on his land was his. This remained true to some extent at the time of William the Conqueror (Doomsday Book II. 290 b). But the Bishop or other ecclesiastical dignitary in the locality could withhold the spiritual attributes necessary to convert the building into a true church by refusing to consecrate it unless the priest was provided for. Pollock and Maitland, 2d ed., i. 498, 499.

⁴ As in charter from King Ethelbert to Rochester Cathedral, 604 A. D. "To thee, Saint Andrew, and to thy church at Rochester where Justus the Bishop presides, do I give a portion of my land." Kemble, Cod. Dipl., i. No. 1; Stubbs and Haddann, iii. 52; Councils and Ecclesiastical Documents relating to Great Britain and Ireland.

clergy was not the *universitas*, but represented it. As the clergy advanced in practical importance while the institution receded, the theory of the ideal person was unconsciously transferred from the church to them. Being primarily the personification of an institution, the theory naturally was extended to cases where there was only one cleric. Thus was introduced that curious anomaly, not really a corporation at all, namely, the corporation sole.¹ We have shown that the theory was constructed primarily not to represent the oneness produced by the association of several, but, on the contrary, merely as a "feigned substratum for rights." This explains why the ecclesiastical corporation was called not only a person but a fictitious person.

The groups in lay and church life alike represented the genuine development of the corporate idea. In the ecclesiastical groups, however, appeared so many manifestations not germane to the development² that it is no wonder centuries elapsed before the two sets of groups, lay and clerical, were brought under one head. In the fourteenth and fifteenth centuries, however, church and state came more closely together. The corporate development of each became common knowledge, and lay and ecclesiastical groups were established on the same basis.

In the foregoing it has been impossible to assign precise dates to the events narrated, or to treat them in the order in which they occurred. Much that has been given in sequence, in reality went on at the same time. The effort has been to select the salient characteristics of the development and present them in a somewhat

¹ Blackstone says (Commentaries, p. 468): "But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation, particularly with regard to sole corporations consisting of one person only, of which the Roman lawyers had no notion; their maxim being that *tres faciunt collegium*." Pollock and Maitland, on the other hand, with what seems to the writer wholly adequate reason, call the corporation sole "*that unhappy freak of English law*." Hist. of Eng. Law, 2d ed., i. 488, note 1.

"The idea of a corporation sole has been claimed as peculiar to English law, but the novelty consists only in the name; and it has been justly remarked that, 'as so little of the law of corporations in general applies to corporations sole, it might have been better to have given them some other denomination.'" Dr. Wooddeson, Vinerian Lectures i. 471, 472.

² Problems which in themselves were difficult were made yet more difficult by the slow growth of the idea that the head of the monastery, though he is a natural person, is also in a certain sense an immortal, non-natural person, or corporation sole, and is likewise the head of a corporation aggregate. Pollock and Maitland, 2d ed., i. 436. In ecclesiastical affairs "the corporation aggregate was almost resolved into a mere collection of corporations sole." *Ibid.* 507.

logical order. The facts are not important as facts, but as indicating the inherent nature of the corporation.

To sum up: The unit interest or oneness produced by the association in different ways of several persons became such an active factor in practical affairs that people were forced to recognize it as something independent. The oneness had to be given a place in business and in law as something definite.¹ It happened that the basis of a person² was adopted; unfortunately, through the influence of a theory entirely proper where it belonged, namely, in church ownership, this person was called a fictitious person. Unfortunately, because the word "fictitious" or "artificial" says more than is necessary, connotes something far removed from the practical everyday affairs of life; signifies feigning or make believe. A corporation is really a collection of flesh-and-blood individuals who have an identity of interest in certain affairs. Neither the individuals nor the relation they bear to one another is fictitious. The mechanical necessity of the case requires that these individuals in their group capacity be put upon some definite basis, and they are therefore treated as a single person. But there can hardly be said to be anything unreal about the matter. A nation represents merely the relationship of certain human beings to one another, but we should hardly call the United States or England a fiction.³

The corporation, then, grew by nature. It was the product of a natural evolution. During all the period with which our discussion has concerned itself there was no rule that the corporation must have some definite and authoritative commencement. There was no rule that the corporation must be erected, set up, made, by act of the sovereign power. By the middle of the fifteenth century, however, it was settled as a matter of positive law that the corporation must be created by the sovereign power.⁴ This rule arose simply from considerations of political expediency. It was

¹ Pollock and Maitland call the personality of a corporation "a blank form of legal thought." *History of English Law*, 2d ed., i. 486.

² "Now the words 'person' and 'personality' seem to be appropriate words, and if they were not at our disposal we should be driven to coin others of a similar import." *Ibid.* 488.

³ In an article not called to his attention until the present article was ready for the printer the writer is gratified to find certain views which seem to be in accord with those here presented. See "The Personality of the Corporation and the State," by W. Jethro Brown, 21 *Law Quarterly Review* 365.

⁴ Y. B. 14 Henry VIII. f. 3 (Mich. pl. 2), P. Q. W. 18; Gross, *The Gild Merchant* ii. 34.

recognized that boroughs, organized communities, might be dangerous. It would not do for the sovereign power to have them exist too freely. This reason also applied to the gilds which were likely to become aggressive. Here too was a good source of revenue. The privilege of being a borough or the right to form gilds would be bought. The rule of law was based, like other rules of law, on public safety and convenience.

We have seen that the oneness of the borough was definitely recognized in practice by the king and by others, by the community long before this rule of law was thought of.¹ And this recognition came by common consent as something required by the necessities of the case. When this rule of law was established, therefore, it really meant: recognition of corporations cannot continue without the king's express consent. The sovereign's act was not creation, but permission. In other words, the king's charter of incorporation performs no magic. Beyond peradventure the group person is not fashioned out of nothing by the sovereign power. If there be magic anywhere, it lies in the mode of thought which considers several persons for certain purposes as one, plus the actual happenings which make the thought important. Nevertheless, from the time when this rule of law became established the permission was given in form as though it were creation.² This was without doubt due not to accident, but to the necessity of defining with exactness the powers and duties of the group person permitted to exist. The oneness of several recognized by the community, even though recognized as a person, would be somewhat vague in these respects. Therefore charters of incorporation have universally said in so many words "incorporate"; that is, they have in form expressly set up or created the legal person. This made it necessary to account by some theory for the corporations already existing which had never been expressly incorporated. It was said that such were corporations by prescription.³

¹ "The formal incorporation of boroughs in the fourteenth and fifteenth centuries did not materially alter the town constitution; it was in most cases merely a recognition of existing franchises with a stronger accentuation and a more precise formulation of the right of independent action as a collective personality with a distinctive name, — especially as regards holding real property." Gross, *The Gild Merchant* ii. 95.

² In 1440 the first municipal charter of incorporation was granted by statute of 18 Henry VI. c. 6. By its terms the mayor, burgesses, and their successors, mayors and burgesses of the town of Kingston-upon-Hull, are incorporated so as to form "one perpetual corporate commonalty" by the title of "The Mayor and Burgesses" of the said town.

³ *Jenkins v. Harvey*, 1 Gale 457.

The fact that permission of the sovereign was given in the form of creation, however, had another and a far greater effect on corporate law: an effect of capital importance. If permission only were given, the corporation could never be very different from the group person called into existence by common consent, by the recognition of the community. It would be no more than a species of machinery which facts made necessary in order that complex situations might be better handled and civilization advance. The opinion as to what was necessary would change, but the corporation would always depend upon the general opinion of the community. There could never be anything arbitrary in its character. If, however, the corporation were created by the sovereign, its powers and characteristics would depend not on the consent of the community, but on the will of the sovereign. In other words, corporations came to be things made according to the ideas of the sovereign. Even so, it was long before the sovereign went in advance of the general opinion, and corporations were for a long time limited to endeavors strictly for the public.

Gradually, however, the corporation came to be used in private enterprise. It was recognized by business men as a species of machinery having great advantages over an individual, and they proceeded to adapt it for their purposes. The rule of law that the corporation is created allowed persons selfishly interested to have their own ideas recorded by sovereigns that knew little of the subject. Particularly in this country and within the last forty years the corporate idea has been seized and developed with Yankee ingenuity to a point which in the light of the genesis of the corporation is startling.

A corporation which in business affairs can do practically anything and everything that can be done by an individual and can do it anywhere and everywhere¹ is a long distance from the true corporation which was brought into existence by absolute necessity, which was recognized simply because the progress of events demanded its recognition, which was the result of natural growth, of logical evolution. The modern corporation is the product of arbitrary legislation struck off at a given time. It does not represent the natural growth of the corporate idea, but rather is a distorted application of that idea. Serving as a buffer between

¹ See Charter of United States Steel Corporation, and, generally, forms in Dill on New Jersey Corporations.

questionable acts and their natural consequences, it has been used to bring about a state of affairs in the commercial world which rests on neither a just nor a sound basis.¹ If existing conditions are to be improved, it must be by intelligent amendment of our corporation laws. An exact standard by which to measure proposed legislation is not to be hoped for; but in a clear understanding of what a corporation really is we may find both guidance and authority for action.

Robert L. Raymond.

BOSTON, February, 1906.

¹ A Statement of the Trust Problem, 16 HARV. L. REV. 79.

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LIABILITY FOR STOCK ISSUED FOR OVERVALUED PROPERTY. — Probably nowhere to-day are corporations forbidden to issue stock payable in property necessary for the conduct of their business. The creditors' right to reach unpaid subscriptions renders important the determination as to when stock so issued is to be regarded as full-paid. The multitude of decisions on this subject discloses the widest diversity. There is a clear-cut difference between England and America. An English creditor must work out his rights through the corporation, and, therefore, normally, any contract between company and stockholder is conclusive.¹ But in this country, owing to the creditor's larger rights, for which various theories have been advanced, of which the "trust-fund" doctrine is the most widely accepted, the corporation's bargain is not necessarily binding on him.² One line of cases maintains that when stock is issued in good faith, despite overvaluation of the property, the stockholder is protected from further liability.³ Thus, where a partnership through a book-keeper's error excessively capitalized its assets, the stock received in exchange was deemed full-paid.⁴ Again, the uncertainties of mining have led the courts to sanction the purchase of mining properties at purely speculative valuation, though these rulings have been discredited by recent decisions.⁵ The United States Supreme Court has also sanctioned the issuance of stocks for property worth merely the market value of the shares to enable a going concern to pay debts or prosecute its business.⁶ On the other hand, the better

¹ See *In re Baglan Hall Colliery Company*, L. R. 5 Ch. 346, 357.

² See 15 HARV. L. REV. 844.

³ *Coffin v. Ransdell*, 110 Ind. 417; *Graves v. Brooks*, 117 Mich. 424.

⁴ *Taylor v. Cummings*, 127 Fed. Rep. 108.

⁵ See *Kelly v. Clark*, 21 Mont. 291, 335.

⁶ *Clark v. Bever*, 139 U. S. 96; *Handley v. Stutz*, *ibid.*, 417.

decisions seem to insist on money's worth when property is taken in exchange.⁷ The statutes, they hold, point out two methods of payment, but only one standard of value, namely, the par value of the stock. Good faith is immaterial, if in fact there is a careless or reckless over-assessment of property. Thus, when patents on inventions were assigned to corporations at a valuation considerably above the fair value of the property, or when the value was wholly speculative, the stockholders were held liable for the proportional deficiency on their stock.⁸ Bad faith, in the sense of actual intention to defraud, can seldom be alleged and less often proved, for most speculators are hopeful of the future. Over-valuation, resulting in watered stock, is generally practised when several plants are combined into a single concern. In a case, last year, before the Court of Chancery of New Jersey, promoters having secured options on, as they alleged, practically all straw-paper manufactories, sold the property to a corporation, formed for the purpose, at a valuation of more than twice the option prices. The defense was made that the alleged monopoly of business thus secured warranted belief in large profits, but the court declared that prospective profits, a mere expectancy, could not be capitalized and regarded as property under the statute. *See v. Heppenheimer*, 61 Atl. Rep. 843.

Apart from the difficulty of applying it, the "good-faith" rule seems to lose sight of the true purport of the statutes under which the creditors in these cases commonly seek to enforce their rights. These statutes are really declaratory of a public policy in the regulation of corporations, in favor of the public at large, and especially in favor of prospective creditors.⁹ Its capital being the basis of a corporation's credit, the state demands money or its equivalent to be paid by those to whom stock is issued, and gives creditors a direct right, after a corporation's assets are exhausted, to enforce such claim against stockholders who have failed to comply with this condition. The contention is made that inflation is a commonly recognized practice, and no reliance is in fact placed on the declared capital; but it is this very stock-jobbing, whereby inflated stocks are sought to be unloaded on the public, that the state seeks to discourage. Then it is urged, if men who transfer property for full-paid stock are liable to be called for further payment in time of insolvency, desirable consolidations of businesses will be discouraged. The possible evil is highly magnified. For in measuring what is property, a fair and reasonable test should be taken,—such a standard as a business man investing his own funds would apply. Courts allow a wide margin for reasonable differences as to values. The good-will of an establishment is surely an item of property, in estimating which even the reasonable profits of the seller and the enhanced value that comes from peculiar factors, such as a monopoly of the trade, are important considerations. But to allow stocks to be given for contingent profits is to speculate at the public's risk. If courts generally would recognize the public policy behind these statutes, the question would reduce itself simply to one of fact in each case, whether, under all the circumstances of the transaction, the par value of the stock was a fair

⁷ *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Gates v. Tippecanoe Stove Co.*, 57 Oh. St. 60; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 103 (*semble*).

⁸ *See State Trust Co. v. Turner*, 111 Ia. 664.

⁹ *See Elyton Land Co. v. Birmingham, etc., Co.*, 91 Ala. 407; *Gamble v. Queens County Water Co.*, *supra*.

and reasonable price for the property. The objection as to a possible disinclination to transfer property may be obviated, perhaps, by providing for some statutory publicity of the transfer, and thereby charge creditors with full notice of the facts.

CONTRACTS TO EMPLOY ONLY UNION MEN.—In the relations between an employer, a labor union, union members, and non-union laborers, one of the reciprocal rights involved is freedom to enter into or to refrain from contracts of employment. The destruction of this expectancy may be the basis for actions in tort; it is also capable of being surrendered by contract. Although the question of tort arising from interference with the right has called forth much discussion, and although similar contracts limiting expectancy of traders are the subject of numerous cases on the restraint of trade, contracts dealing with labor expectancy are seldom before the courts. The Court of Appeals of New York, reversing the Appellate Division,¹ has recently sustained a three-cornered contract between an employer, a labor union, and the firm's employees, which provided that only union members should be employed, and only such of those as should be in good standing, and that on request of the union the firm should discharge all others. *Jacobs v. Cohen*, 183 N. Y. 207. The decision involves two questions: (1) whether an employer can make, with laborers or with a third party, a binding agreement to limit his expectancy in the labor market; and (2) whether laborers may engage among themselves to destroy the expectancy of other laborers. Another New York court has just decided, in accordance with the prevailing law,² that an employer's privilege of employing or discharging union or non-union men at his own caprice is protected by the constitutional guaranties. *People v. Marcus*, 34 N. Y. L. J. 1149 (N. Y. App. Div., Dec. 1905). A workman's freedom of employment must also be a property right, and contracts by either to limit his own freedom will be enforceable unless invalid for some reason of policy.

Logically considered, the employer's agreement was to confine his competition for labor to a narrow class, but he did not contract with a competitor, and only such combinations are forbidden, since from them monopoly is more likely to ensue. As contracts for exclusive agency,³ exclusive dealing,⁴ and exclusive employment⁵ are freely enforced, there should be not the least objection to the employer's contract.

Under the New York doctrine that procuring without fraud or intimidation the discharge of a fellow servant is not actionable unless done with an improper motive,⁶ a contract to effect the same result will of course be unobjectionable unless it be inspired by malevolence.⁷ By another view,

¹ *Jacobs v. Cohen*, 90 N. Y. Supp. 854; 18 HARV. L. REV. 471.

² *Gillespie v. The People*, 188 Ill. 176. See also *State v. Julow*, 129 Mo. 163.

³ *Central Shade Roller Co. v. Cushman*, 143 Mass. 353.

⁴ *Chicago, etc., Railroad Co. v. Pullman Car Co.*, 139 U. S. 79, 89.

⁵ *Pilkington v. Scott*, 15 M. & W. 657.

⁶ *National Protective Ass'n v. Cumming*, 170 N. Y. 315; followed in *Wunch v. Shankland*, 179 N. Y. 545; 59 N. Y. App. Div. 482. See also "Interference with Contracts and Business in New York," by E. W. Huffcutt in 18 HARV. L. REV. 423, 439.

⁷ See *Curran v. Galen*, 152 N. Y. 33; affirmed but distinguished in *National Protective Ass'n v. Cumming*, *supra*.

to prevent employment of a laborer is a *prima facie* tort,⁸ unjustified by labor competition.⁹ Apparently it would follow that an agreement which prevents employment is illegal. But it is believed that the general statement needs qualification, and that the decisions are best explained upon the principle that justification is withheld only where the competitive injuring pressure is applied through unwilling outsiders, and because of the interference with those third parties.¹⁰ Consequently, a contract peaceably obtained with the outsider, in this case the employer, removes that objection. Obviously, fraud or force in obtaining the agreement would for a different reason render it unenforceable. Nor does it seem that the laborers' contract is against policy as a restraint of trade. From an economic standpoint a combination of rival laborers limits competition as truly as does a combination of rival merchants, but the courts now discriminate, and favor contracts between laborers, although they are intended to stifle competition and raise wages.¹¹ By analogy to the modern cases on restraint of trade,¹² public policy should not countenance such contracts when they afford more than a reasonable business protection to the parties, and when their result approaches monopoly; but until further decisions readjust the balance between the policy of unfettered contract and the abhorrence of monopoly, it appears that the common "union shop" contracts will be enforced.

EJECTMENT FOR ENCROACHMENTS ON LAND ABOVE THE SURFACE. — Although an action on the case for a nuisance is allowed both in England and in the United States for projections of parts of buildings over adjoining land,¹ the advantages of ejectment have led in this country to attempts to apply it to such situations. The cases, however, are so few and contradictory that there is still occasion for a reference to fundamental principles in the effort to work out a correct result. In legal contemplation land is regarded more as a solid or volume than as a surface, although its third dimension is necessarily indeterminate. As it may be divided vertically, so there may be horizontal divisions, and there may be an estate in the minerals underneath or in the upper story of a house without ownership of the surface. It is quite possible, therefore, that there should be several estates coextensive with the same lateral limits, and that different occupants should be in possession above the surface, on the surface, and below it. But as description of land in the ordinary form presumptively includes everything above and below the surface, so possession of the soil is presumed to extend up and down unless rebutted by the possession of another. For example, it has been held that where adequate adverse possession of the surface gave title to it, the title did not cover mines in operation underneath.²

⁸ *Erdman v. Mitchell*, 207 Pa. St. 79. See also "The Closed Market, the Union Shop, and the Common Law," by Wm. Draper Lewis, in 18 HARV. L. REV. 444, 451.

⁹ *Plant v. Woods*, 176 Mass. 492.

¹⁰ See 17 HARV. L. REV. 65.

¹¹ *Cf. Commonwealth v. Hunt*, 4 Met. (Mass.) 111. But see *contra*, *People v. Fisher*, 14 Wend. (N. Y.) 6, representing the earlier view.

¹² See *Nordenfelt v. Maxim, etc., Co.* (1894), A. C. 535.

¹ *Fay v. Prentice*, 14 L. J. C. P. (N. S.) 298; *Codman v. Evans*, 89 Mass. 431.

² *Delaware and Hudson Canal Co. v. Hughes*, 183 Pa. St. 66.

It would be surprising, therefore, if ejectment were restricted to ousters from the surface estate, and it has not been so restricted. From early times up to the present, ejectment has lain for the wrongful occupation of a mine³ or of the upper story of a house.⁴ What difference in principle is there in the case of projecting eaves, walls, bay-windows, and foundation stones?⁵ The dispossession of the owner from a part of his land, though small, has been actual and permanent in its nature. The disseisor may not be personally present, but he has subjected the land to a purpose of his own to the exclusion of the owner.⁶ The fact that the instrument of occupation does not rest on the soil is of no consequence. The upper stories of a great office building in New York have been built depending for their support on an adjoining building, yet they would seem to constitute an effectual occupation of the premises. There is no greater difficulty in the sheriff delivering possession than in the case of underground encroachments from neighboring land.

It seems hard to escape from the above considerations. The courts that refuse the action rest their decisions mainly on the apparent intangible nature of the invasion, which they regard as effecting not a loss of possession, but merely an injury to its exercise.⁷ Some recent Wisconsin cases adopt the view that where the plaintiff has occupied to the line under the projecting eaves he has elected to treat the encroachment as a mere trespass.⁸ This reasoning is evidently founded on the notion that an ouster, to be effective, must be from the whole of a vertical plane, including the surface, but the fallacy in thus mistaking a presumption for a necessity has already been shown. New York has vacillated, but the latest case on the question decides that ejectment will lie for a telephone wire strung without right over the plaintiff's premises. *Butler v. The Frontier Telephone Company*, 109 N. Y. App. Div. 217. A more extreme case within the principle could scarcely be imagined, but evidently no requisite is lacking. The defendant assumed continuous control of the wire, and used it for his own business purposes. It was not a dead wire abandoned on the premises, and control yielded up. On this distinction a different result might be reached in the case of overhanging branches of trees, for there in many instances the adjoining landowner makes no assumption of possession.⁹

ATTACHMENT OF GOODS FOR WHICH A NEGOTIABLE DOCUMENT OF TITLE IS OUTSTANDING. — At common law the title to goods in the possession of a bailee could not be transferred without attornment.¹ As that rule interfered with the freedom of commerce, bills of lading and warehouse receipts became, by the custom of merchants, representatives of the goods, and their

³ *Comyn v. Kyneto*, Cro. Jac. 150; *Moragne v. Doe d. Moragne*, 39 So. Rep. 161 (Ala.).

⁴ *Ford v. Lerke*, Noy 109; *Brady v. Kreuger*, 8 S. Dak. 464.

⁵ *Sherry v. Frecking*, 4 Duer (N. Y.) 452; *Murphy v. Bolger Brothers*, 60 Vt. 723. See *McCourt v. Eckstein*, 22 Wis. 153.

⁶ Cf. *Quicksilver Mining Co. v. Hicks*, 4 Saw. (U. S. C. C.) 688.

⁷ *Aiken and Ketchum v. Benedict*, 39 Barb. (N. Y.) 400. See *Norwalk Heating and Lighting Co. v. Vernam*, 75 Conn. 662.

⁸ *Rasch v. Noth*, 99 Wis. 285.

⁹ See further 14 HARV. L. REV. 291.

¹ *Rich v. Alfred*, 6 Mod. 216.

transfer had the same effect as the delivery of the goods themselves in passing the transferer's interest.² When the custom of merchants was incorporated into the law, the mercantile view of documents of title was not adopted in its entirety. Merchants believed that they should be the sole representatives of the goods, so that no interest in the goods could be gained except through them. The law went the full length in accepting that principle as applied to commercial paper, and in most jurisdictions the maker of a note or the acceptor of a bill of exchange cannot be garnished unless the instrument is reached.³ But in regard to documents of title a half-way position was taken, and though the receipt is a representative of the goods, as was recently held by the Kentucky Supreme Court, the goods also represent themselves, and an attachment of them prevails against a subsequent purchaser of the receipt without notice of the attachment. *Kentucky Refining Co. v. Bank of Morillon*, 89 S. W. Rep. 492.⁴

Professor Williston, of the Harvard Law School, at the request of the Commissioners on Uniform State Laws, has prepared a draft of a Sales Act which has been considered by the Commissioners at two national conferences, and which they hope to adopt in its final form this year. One of the most difficult points to be decided is as to what change shall be made in the existing law on this question of transferring property by documents of title. There is a strong sentiment in favor of adopting the extreme mercantile view and forbidding any attachment of the goods. Farmers and planters who store their crops in local warehouses and borrow money at financial centers find lenders unwilling to accept the receipts as security because there may be an attachment on the goods. The strongest objection to the mercantile view is that, by putting the goods beyond the reach of attachment, it is made easy for dishonest bailors to evade their creditors, — an inevitable result if the documents of title are the only representative of the goods.⁵

Efforts have been made to reach a compromise which will make the instruments more negotiable than at present and still leave it possible to attach the goods. It was suggested that the goods be attachable, but that a subsequent *bona fide* purchaser of the receipt should prevail. The objection is that receipts have no date of maturity, and as a purchaser might appear years later with the receipt, it would be unsafe for the bailee to surrender the goods to the attaching creditor. As the act is now drawn, the existing law is unchanged except that a transferee of the document who takes it for value within ten days of its issue prevails over a prior attaching creditor of whom he had no notice. It is purely a compromise measure, and business men feel that it does not go far enough. Business conditions demand that the transfer of title of goods in storage or transit be made as easy as possible, and, as the more freely the documents of title are negotiable, the less opportunity creditors have to attach the goods, the question is, shall the interests of creditors give way before the necessities of the business world? There is still a chance that the answer will be in the affirmative, and that the extreme mercantile view will be accepted, or at least that, in the final draft of the act, the ten-day period will be materially extended.

² See Benjamin, Sales, 7th ed., §§ 815, 817.

³ *Hutchins v. Evans*, 13 Vt. 541.

⁴ See *Roudebush v. Hollis*, 21 Pa. Co. Ct. 324; *Landa v. Holck & Company*, 129 Mo. 663.

⁵ See *Collins v. Smith*, 12 Gray (Mass.) 431.

TORT LIABILITY OF CONTRACTOR OR VENDOR TO PARTIES NOT PRIVY TO THE CONTRACT. — It is stated as a general rule of law that a contractor or vendor is not liable to third parties for the negligent construction of a chattel after its completion or sale.¹ The inroads, however, made upon this doctrine by American decisions² give pertinence to a questioning of its real existence in this country.

The principal reason urged in support of the rule in question is that a contractor or vendor owes no legal duty of care in the construction of his wares where there is no privity of contract. The American courts, however, early found such a legal duty owing to third parties where the chattels sold are imminently dangerous to human life.³ The principle of these cases has been applied not only where the article is imminently dangerous in its normal state, but also where such imminent danger arises solely from defects in its construction.⁴ Thus, in a recent case before the Kansas City Court of Appeals, a bridge company, which had turned over a bridge to county commissioners on a building contract, was held liable to the plaintiff for defects in the bridge which rendered it imminently dangerous to human life and of which the company had notice. *Casey v. Hoover*, 89 S. W. Rep. 330. Nor need the defects even be such as imminently to imperil life; if at the time of completion or sale the contractor or vendor knows of the latent defect, he will be liable, although the danger be not extraordinary.⁵ An attempt has been made to explain this latter class of cases on the ground of deceit. But to hold that a vendor by the mere sale of a chattel known to be defective, makes, with intent to defraud, a false representation to every probable user of that chattel, and that such third party acts in reliance upon such representation, is such a strain upon actual facts as to call for a broader ground of liability to support the cases. Under the decisions, the legal duty of a contractor or vendor to use care in the construction of chattels seems to extend generally to third parties, except, perhaps, in the single case where the defective article is but slightly dangerous to life, and the vendor has no knowledge of its condition at the time of sale.⁶

The reasoning of American courts in these cases⁷ shows a strong inclination to apply the basic principle of all liability for negligence — that where a person sustains such relations to society that danger to others will result from a failure to use due care in his activities, he owes the legal duty of such care to that class of persons likely to be injured by his failure to exercise it. The specific application of this principle would make a contractor or vendor liable to probable lawful consumers for the negligent construction of chattels, such liability being limited of course by the ordinary rules of "natural and probable cause" and "contributory negligence."⁸ The most palpable case for such an extension of a vendor's liability would be in favor of a sub-vendee where the chattel is sold to a retail dealer for the express purpose of resale; but on principle the extension should obtain

¹ *Winterbottom v. Wright*, 10 M. & W. 109.

² See *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. Rep. 865; 61 L. R. A. 303.

³ *Thomas v. Winchester*, 6 N. Y. 397; *Devlin v. Smith*, 89 N. Y. 470.

⁴ *Skinn v. Reutter*, 135 Mich. 57; see 17 HARV. L. REV. 274.

⁵ *Lewis v. Terry*, 111 Cal. 39; 31 L. R. A. 220.

⁶ *Schubert v. J. R. Clark Co.*, 49 Minn. 331.

⁷ See *Huset v. J. I. Case Threshing Machine Co.*, *supra*.

⁸ See 1 Thompson, *Negligence* §§ 821, 824; Clerk & Lindsell, *Torts*, 3d ed. 442-453; 21 Am. & Eng. Cyc., 2d ed., 461, 462.

in favor of every probable, lawful user, and such an extension has, in fact, been recognized in the case of the guest of a vendee who had bought for his own use.⁹ Though logically applicable to injuries to property, the proposed rule will probably not be extended beyond personal injuries for some time to come, in view of the fact that it is growing out of exceptions established in cases of imminent danger to life.¹⁰

NOTICE TO THIRD PARTIES OF ATTEMPTED REVOCATION OF AN AGENCY.—

Revocation of an agency is not complete until notice of the revocation is given to the agent.¹ Nor is the agency terminated by the fact that a third person with whom the agent deals knows of the attempted revocation. Accordingly, a deed executed by an agent under these circumstances will pass a legal title to the purchaser. The application of these principles to a transfer by an agent under a statute providing for the recording of the revocation of the agent's authority has given rise to an interesting decision in the Wisconsin court. *Best v. Gunther*, 104 N. W. Rep. 918.² In this case neither the agent nor the third party had actual knowledge of the revocation which had been recorded by the principal, and the court held that a mortgage executed by the agent was binding against the principal. The dissenting justice, recognizing the hardship of this result, protected the principal by holding the record constructive notice to the agent. Although there is some authority to that effect,³ and the result is just, it would seem that the reasoning by which it is reached is fallacious. Constructive notice to the agent alone would not protect the principal, since, so long as the agent retains the instrument showing his authority, a *bona fide* purchaser from him gets a good title.⁴ To protect the principal constructive notice to the purchaser is necessary, and this, it seems, must be the sole purpose of the act. Even as the recording of transfers is provided for in order to put purchasers on their guard and show them where title actually is, so the record of a revocation is to protect the owner from the act of a dishonest agent.⁴ The record, therefore, must be held to give constructive notice to all who may subsequently deal with the agent; if this be not its object, the law requires a superfluous act.⁵ The agent, moreover, is not likely, nay, he is under no duty, to search the records for a change in title subsequent to the creation of his agency. He may even recover commissions upon contracts for the sale of land made after revocation of his agency by a transfer of the land by his principal and after such transfer is recorded.⁶

It is clear, then, that in a case like the present the purchaser gets a legal title, but it seems equally clear that he takes it subject to an equity. If the notice be actual, he is taking that which he knows his grantor does not intend and is even unwilling to part with. He obtains it by concealing that which if communicated would revoke the agency and vitiate the transfer.

⁹ *Lewis v. Terry*, *supra*.

¹⁰ But see *Skinn v. Reutter*, *supra*.

¹ See Story, Agency, 9th ed., § 470.

² For majority opinion, see *Best v. Gunther*, 104 N. W. Rep. 82.

³ *Arnold v. Stevenson*, 2 Nev. 234.

⁴ See Tiffany, Agency, 138, 151.

⁵ See *Arnold v. Stevenson*, *supra*.

⁶ *Loehde v. Halsey*, 88 Ill. App. 452.

This, it seems, should raise a constructive trust in favor of the grantor. It seems analogous to the principle that one with knowledge of a special limitation on an agent's apparent authority is bound by the limitation;⁷ or to the right of an accommodating party upon negotiable paper to withdraw his accommodation and escape liability to all taking with notice;⁸ or to the right of a majority of a partnership to protect itself by notice of its will to third parties.⁹ If notice be constructive, the third party may protect himself by ordinary care, and the contrary rule would be extremely hard upon a principal with a dishonest agent to whom he cannot get actual notice of revocation.

If the third party, who has knowledge of the attempted revocation, obtains a contract from the agent, it seems the same equities would arise as in the case where he obtains a chattel or title to land under similar circumstances. No court would grant specific performance of a contract so obtained, and in the present case it seems that full equitable relief should have been given.

THE CONSTITUTIONALITY OF JUVENILE COURT ACTS. — In a recent decision, which is of especial interest and importance since it is one of the first to consider this question, the Supreme Court of Illinois declared unconstitutional one of the most important provisions of the state Juvenile Court Act.¹ The court held that a father who could and did provide a good home for his child had been deprived of his right to the child's custody without due process of law, because the latter had been committed to a home for boys during his minority merely for committing two criminal assaults. *People v. McLain*, 38 Chi. Leg. N. 166 (Sup. Ct. Ill., Dec. 20, 1905). The state undoubtedly has the right to deprive the father of the custody of his child by such proceeding as this if the father is not a fit and proper person to rear his children.² The validity of the present decision may be doubted on the simple ground that the fact that the child has committed a criminal assault shows that the father is not able to care for it properly. While the father might be able to control an ordinary boy, his failure to develop this boy into a law-abiding citizen is at least evidence of his incompetence. It is therefore questionable if the action of the juvenile court is so unreasonable as to authorize the court to declare it unconstitutional. But there is another objection to the case which seems to be conclusive. The reasoning of the court is premised upon the proposition that the father has a vested property right to the custody of his children. It is believed, however, that this parental right is merely a privilege granted to the parent by the state, which may consequently be withheld by the state if it sees fit.³ It has seen fit to allow the father the privilege of caring for his children, because the natural affection that exists between them ordinarily renders the father the best person to exercise this control. But if the state

⁷ See *Tiffany*, Agency 180, 183.

⁸ *Dogan v. Dubois*, 2 Rich. Eq. (S. C.) 85.

⁹ See *Munroe v. Conner*, 15 Me. 178; *Clarke v. State V. R. Co.*, 136 Pa. St. 408.

¹ See *Ex parte Loving*, 178 Mo. 194, sustaining a similar statute. See also *People ex rel. Zeese v. Masten*, 79 Hun (N. Y.) 580.

² *Reynolds v. Howe*, 51 Conn. 472; *Cincinnati House of Refuge v. Ryan*, 37 Oh. St. 197.

³ See *Tiedeman*, Limitations of Police Power, §§ 166 *et seq.*

desired, it could transfer the custody of the children to whomsoever it chose. The decisions amply sustain this position. Thus a statute enacting that the custody of children under seven years of age should belong to the mother in case the parents separated has been held constitutional,⁴ and furthermore, in determining who shall care for a minor, courts of chancery or probate courts, whenever a controversy arises, exercise a sound discretion, and frequently deprive the father of his custody if it seems wise, although he may be entirely competent to care for him.⁵

It was further argued by counsel that, as the child had been deprived of his liberty without a jury trial, the constitutional provision guaranteeing jury trial had been violated. The proceeding is certainly not an infringement of the provision, for this is not in any aspect a criminal proceeding. The judgment is that the child is delinquent and as such needs the care of the state. The whole purpose of the commitment is the reformation of the child and not his punishment. Furthermore, the child is not even being deprived of his "liberty," as that word is used in the constitutions. The state is exercising parental restraint, a restraint which is perhaps more severe than that usually exercised by a father, because of the peculiar viciousness of the child. The imposition of such restraint has always been legitimate. Were there any doubt of the validity of this reasoning, it is resolved by an examination of the cases, which fully support it.⁶

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE. — The present doctrine of estoppel between landlord and tenant, first enunciated some hundred and fifty years ago,¹ is purely equitable and essentially different from the old legal estoppel by deed,² which expired with the term granted by the deed.³ In giving up possession of land to a tenant, the owner of course relies on the lessee's recognition of him as owner of the land; and to force the lessor in any action for rent or possession, whether before or after the term has ended, to prove his title would work hardship on him, and tend to discourage landowners from parting with possession of their property. Modern law in such cases protects the landlord by raising, from the permissive occupation of the tenant, an equitable estoppel to deny the landlord's title.⁴

Where the lessee is already in possession of the land demised to him, it cannot be urged that the landlord has given him possession of the land, and on this reasoning it has been held that an estoppel does not arise.⁵ It is argued that not only is the lessor not worse off, but that he is even in a better position, since he has gained rent, and, in the event of a controversy, a *prima facie* case against the occupant. But the great majority of American

⁴ *Bennet v. Bennet*, 13 N. J. Eq. 114.

⁵ *Jones v. Darnall*, 103 Ind. 569. For a careful review of the decisions see *Hurd, Habeas Corpus* 461 *et seq.*

⁶ *Ex parte Nichols*, 110 Cal. 651; *Prescott v. State of Ohio*, 19 Oh. St. 184; *contra*, *People ex rel. O'Connell v. Turner*, 55 Ill. 280. See, however, *Petition of Ferrier*, 103 Ill. 367.

¹ *Doe v. Pegge*, 1 T. R. 758, notes.

² Lit. § 58.

³ Co. Lit. 47 b.

⁴ See 2 Taylor, *Landlord and Tenant*, 9th ed., §§ 629, 705.

⁵ *Franklin v. Merida*, 35 Cal. 558.

jurisdictions recognize the estoppel,⁶ unless fraud or mistake makes it inequitable,⁷ reasoning that the creation of the relationship of landlord and tenant in itself alters the position of the parties.

The Supreme Court of Georgia, in a recent decision, though professing to accept the doctrine of this second class of cases even though the lessee at the time of the plaintiff's lease was already in possession under a third person, limits the estoppel in favor of the second lessor to the duration of the second term. *Hodges v. Waters*, 52 S. E. Rep. 161. The decision seems almost to confound the legal estoppel of Lord Coke with the present equitable estoppel. It has been held, in a state of facts similar to those in the present case, that the tenant, by notice to the second landlord, may terminate the tenancy with the term demised, though he continues in possession.⁸ In the present case he failed to do so; and the plaintiff, thus lulled into security, allowed the holding over to develop by lapse of time into a tenancy from year to year,⁹ and permitted the relationship of landlord and tenant to continue. The landlord's position is, then, no better than during the existence of the original term, when it seemed equitable to raise the estoppel, and the termination of the lease should be without effect on the continuance of the estoppel.

RECENT CASES.

ACTIONS — MOTIVE IN INSTITUTING ACTION AS DEFENCE THERETO. — The plaintiff, with the object of bringing about the bankruptcy of the defendant, a co-director, and of having him thereby disqualified and removed from the directorate, took an absolute assignment from the defendant's creditors, with a covenant that the amount of the debts recovered, less costs, should be paid over to the assignors; and notice of the assignment was given to the defendant. *Held*, that the plaintiff may maintain an action against the defendant for the debts so assigned. *Fitzroy v. Cave*, 93 L. T. R. 499 (Eng., C. A., June 9, 1905).

Although the question how far a defendant's motive should determine his liability for causing damage to a plaintiff is involved in much conflict, the courts are harmonious in holding that even the most reprehensible motive does not make him liable for causing the plaintiff to suffer the consequences of the latter's own breach of duty. See 18 HARV. L. REV. 411, 412. Thus, the most vindictive motive does not give rise to a cause of action for ejecting a trespasser or for collecting a debt. *Brothers v. Morris*, 49 Vt. 460; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. Neither can the motive for suing a trespasser or a debtor furnish a defence to the action. *Jacobson v. Van Boening*, 48 Neb. 80; *Bragg v. Raymond*, 11 Cush. (Mass.) 274. And even where the plaintiff, with evil motive, procures an assignment of a mortgage to foreclose it, or becomes a shareholder in order to enjoin a corporation, paramount public policy requires that the court should look at the cause of action alone. *Morris v. Tuthill*, 72 N. Y. 575; *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337, 353. There is no hardship in compelling a defendant to discharge his obligation; but there is grave danger in permitting him to plead the motive of every creditor who seeks to enforce it.

⁶ *Lyon v. Washburn*, 3 Col. 201.

⁷ See 2 Taylor, Landlord and Tenant, § 707.

⁸ *Voss v. King*, 33 W. Va. 236.

⁹ See 1 Taylor, Landlord and Tenant, §§ 22, 65.

AGENCY — TERMINATION OF AUTHORITY — NOTICE TO THIRD PARTIES. — Statutes allowed the recording of a power to sell land and required the revocation of such recorded power to be recorded. *Held*, that the recording of an instrument purporting to revoke the agency did not give constructive notice of its contents to the agent; and that a mortgage thereafter made by him to a third party, who had no actual notice, was binding against the principal. *Best v. Gunther*, 104 N. W. Rep. 918 (Wis.). See NOTES, p. 373.

ATTACHMENT — OF REALTY — EFFECT. — After a federal court had, by its marshal, attached certain land, a state court appointed a receiver to take possession of it. *Held*, that a state court cannot enjoin the federal marshal from selling the land. *Beardslee and McDermott v. Ingraham and Campton*, 34 N. Y. L. J. 1415 (N. Y., Ct. App., Jan. 23, 1906).

For a contrary view, see 19 HARV. L. REV. 210.

BANKRUPTCY — DISCHARGE — EFFECT OF DISCHARGE UPON LIABILITY OF SHAREHOLDER FOR CALLS. — In bankruptcy proceedings against a holder of partly paid shares in a corporation, the corporation proved for the amount uncalled upon the shares, and received a dividend. Subsequently the corporation went into voluntary liquidation, and after satisfying all liabilities had surplus assets available for distribution among its shareholders. *Held*, that for the purpose of distributing the surplus assets, the shares of the bankrupt are not to be treated as fully paid. *In re West Coast Gold Fields (Lim.)*, 22 T. L. R. 39 (Eng., C. A., Nov. 9, 1905).

In the distribution of the surplus assets of a corporation, holders of fully paid shares are entitled to receive the amount paid by them in excess of that paid upon partly paid shares before the holders of the latter are entitled to receive anything. *In re Hodges' Distillery Company*, L. R. 6 Ch. 51; *Krebs v. The Carlisle Bank*, 2 Wall., Jr. (U. S. C. C.) 33. The result of the principal case is therefore clearly correct unless the proof in bankruptcy is equivalent in law to full payment. The general principle, however, is that a discharge in bankruptcy does not extinguish the obligation, but merely bars the remedy. The discharge is no defense to an action upon a provable debt unless specially pleaded, and the privilege of pleading it is in general restricted to the bankrupt. *Jenks v. Opp*, 43 Ind. 108; *Moyer v. Dewey*, 103 U. S. 301. At common law a promise to pay a debt barred by a discharge is binding without further consideration. *Kirkpatrick v. Tattersall*, 13 M. & W. 766. A discharge received by a principal does not terminate the liability of the surety. *Ellis v. Wilmot*, L. R. 10 Ex. Ch. 10. It has also been held that the amount of indebtedness of a discharged bankrupt to a decedent's estate must be deducted from the amount of the former's distributive share in the estate. *Wilson v. Kelley*, 16 S. C. 216; but see *Stammers v. Elliott*, L. R. 3 Ch. 195.

BANKRUPTCY — EXEMPTIONS — LIFE-INSURANCE POLICY. — A bankrupt at the time of his adjudication held three insurance policies. One only of the policies contained an agreement for a cash surrender value, but the other two did in fact have a surrender value which the insurance company signified its willingness to pay. The question arose whether the bankrupt's privilege, under § 70a (5) of the National Bankruptcy Act of 1898, to redeem the policies by the payment to his trustee of their "cash surrender value," applied to those policies for the surrender of which the insurance company had not contracted to pay. *Held*, that the provision in the Act applied only to the policy containing a definite stipulation for a cash surrender value. *Van Kirk v. Vermont Slate Co.*, 140 Fed. Rep. 38 (U. S. Dist. Ct., N. D., N. Y.).

The phrase "cash surrender value," used in the Act, is frequently and naturally employed to describe a policy's present worth even where the contract contains no stipulation for any payment by the company. An interpretation of the phrase which would have included such a policy would not, therefore, have been unwarranted. Moreover, there appears little basis on principle for applying the phrase to those policies alone upon the surrender of which the company is bound to pay. Authorities agree that if the policy has no present worth, it is

exempt. *In re Buelow*, 98 Fed. Rep. 86. The trustee's interest is, therefore, limited to present worth. Furthermore, if the payment of its present worth is guaranteed, it may be redeemed by the bankrupt as provided by the Act. To allow the bankrupt to redeem from his trustee a policy for the surrender of which the company was under no obligation to pay value would be equally favorable to interests represented by the trustee; and such a rule would extend the benefits of the exemption to a case clearly within its spirit. *Cf. In re Josephson*, 121 Fed. Rep. 142. The present decision is, however, supported by the weight of authority. *In re Mertens*, 131 Fed. Rep. 972.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — LIABILITY FOR SERVANT'S ACT. — The plaintiff was a passenger on one of two of the defendant's street cars, which were passing each other. The conductor of the other car, in sport, threw a dead hen towards the car on which the plaintiff was riding, and thereby injured him. *Held*, that the defendant is liable. *Hayne v. Union St. Ry. Co.*, 33 Banker & Tradesman 2683 (Mass., Sup. Ct., Dec. 1, 1905).

A common carrier is liable for all injuries to passengers caused by the misconduct of its servants engaged in executing the contract of carriage. *Stewart v. Brooklyn, etc., Rd. Co.*, 90 N. Y. 588. The present decision seems to involve an extension of this doctrine unwarranted by the theory on which it is based. A carrier owes the duty to each passenger to use the utmost care practicable to protect him from violence. See 15 HARV. L. REV. 670. Accordingly the carrier includes the furnishing of protection to passengers among the duties of those servants who execute their contracts of carriage. When these employees, therefore, willfully or negligently fail to protect the passenger from the violence of a fellow passenger, or *a fortiori* against their own violence, according to settled principles of agency, the carrier is liable. *Spohn v. Mississippi, etc., Ry. Co.*, 101 Mo. 417; *Craker v. Chicago, etc., Ry. Co.*, 36 Wis. 657. The liability, however, is not for the servant's acts of commission, but for the correlative acts of omission. See 12 HARV. L. REV. 504. In the principal case, since the servant whose acts were complained of, as conductor of another car, was under no duty to protect the plaintiff, he committed no act of omission for which the carrier is liable; his positive act was plainly without the scope of his employment. See *Sachrowitz v. Atchison, etc., Rd. Co.*, 37 Kan. 212, 216.

CARRIERS — PERSONAL INJURY TO PASSENGERS — RIGHT TO ENTER STATION. — The plaintiff, having a proper ticket and with intent to become a passenger, went to the defendant's station shortly before train time, but found it locked. The village marshal (though not an agent of the company) unlocked the door and admitted the plaintiff to the waiting-room, where she was injured, while in the exercise of due care, by reason of a defect in the floor negligently left unrepaired by the defendant. *Held*, that the plaintiff is not a trespasser, but is entitled to recover as an expectant passenger. *Chicago and A. R. Co. v. Walker*, 75 N. E. Rep. 520 (Ill.).

A railroad owes the duty to take reasonable care for the safety and comfort of those who present themselves at a proper time, in a proper manner, and at a proper place upon its premises with intent to become passengers. *Exton v. Central, etc., R. Co.*, 33 Vr. (N. J.) 7. This includes the duty to keep its waiting-room safe and properly lighted for a reasonable time before the arrival of each passenger train. *McDonald v. Chicago, etc., R. Co.*, 26 Ia. 124. Upon the facts stated it seems that the plaintiff, when she presented herself at the station, became entitled to the rights of an expectant passenger. The defendant clearly failed to afford her due accommodation. It now sets up its improper failure to open and light the waiting-room as the basis of its contention that when the plaintiff entered therein she became a trespasser, simply because the door was unlocked by one not an agent of the company. But no party may set up his own wrong as a part of his case. 4 Inst. 279. The defendant's contention, therefore, properly fails.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF STOCKHOLDERS TO ELECT DIRECTORS. — A minority stockholder prayed for a decree

enjoining the Equitable Life Assurance Society from amending its charter so as to allow its policy holders to elect twenty-eight out of fifty-two directors. *Held*, that the right to influence the management of a company by the selection of its directors is a property right, of which the amendment would deprive the plaintiff without due process of law, and that the motion should therefore be granted. *Lord v. Equitable, etc., Society*, 109 N. Y. App. Div. 252.

This decision is an affirmation of the decision in the lower court, which was favorably commented upon in 19 HARV. L. REV. 62.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM OF CONTRACT: EMPLOYMENT OF UNION LABOR. — *Held*, that Section 171a of the New York Penal Code, which declares it to be a misdemeanor to require as a condition of employment that the employee shall not belong to a labor organization, violates the state constitution and the Fourteenth Amendment to the Federal Constitution by infringing the right of contract. *People v. Marcus*, 34 N. Y. L. J. 1149 (N. Y., App. Div., Dec., 1905). See NOTES, p. 368.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES: CLASS LEGISLATION — CLASSIFICATION OF CITIES. — *Held*, that a New York statute, regulating employment agencies in cities of the first and second classes only, does not conflict with the "equal rights" clause of the Fourteenth Amendment to the Federal Constitution. *People ex rel. Armstrong v. Warden, etc., of the City of New York*, 183 N. Y. 223.

For a discussion of the constitutional principles permitting such classification, see 16 HARV. L. REV. 59. The case adds one more instance to those in which statutory regulation may discriminate between localities.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — An ordinance restricting gambling was passed by a county board of supervisors in pursuance of statutory authority empowering it to make local police regulations. *Held*, that the legislature may properly delegate such legislative power to county boards. *Hawaii ex rel. County of Oahu v. Whitney*, Sup. Ct. of Hawaii, Nov. 24, 1905.

The exception in favor of municipal self-regulation to the maxim that legislative power may not be delegated is here extended to quasi-municipal corporations such as counties. For a discussion of the tendency to limit the application of the maxim and to expand the exception, see 19 HARV. L. REV. 203.

CONTRACTS — CONSIDERATION — UNILATERAL CONTRACT TO PERFORM A LEGAL DUTY. — The defendant and the plaintiff exchanged promises, the defendant to contribute a certain sum per week to the support of the child of himself and the plaintiff, the plaintiff to vacate a certain alimony order. The defendant was the husband of the plaintiff, and was previously bound in law to do all that he promised. The plaintiff fully performed her side of the bargain, and now brings this suit for a breach by the defendant. The defendant contends that the contract is void for lack of consideration. *Held*, that though the defendant's promise was no consideration for that of the plaintiff, she may, under the circumstances, enforce his promise against him. *Ward v. Goodrich*, 82 Pac. Rep. 701 (Colo., Sup. Ct.).

To render a bilateral agreement binding the promises exchanged must be, reciprocally, adequate consideration. *Lingenfelder v. The Wainwright Brewing Co.*, 103 Mo. 578. By the great weight of authority, also, neither a promise to perform a legal duty already owed to the promisee nor actual performance thereof is sufficient consideration for the reciprocal promise of the promisee. *Foakes v. Beer*, 9 App. Cas. 605. Tried by these principles, the bilateral agreement in the case at hand was bad. It seems clear, however, that in a unilateral agreement consideration need move only from the promisee, since the doing of an act requires no consideration. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS 208. Where performance of the bilateral contract is to take place in the immediate future, the reciprocal promises may also constitute cross offers to a pair of unilateral contracts. In such a case immediate performance, where

such is good consideration, may complete a binding unilateral contract, irrespective of the fact that neither the promisor's promise nor even his performance would have constituted good consideration for the bilateral agreement. The case under discussion may be explained on these grounds.

COPYRIGHT — INFRINGEMENT — RIGHTS OF ASSIGNEE OF COMMON LAW COPYRIGHT. — An artist sold to the plaintiff the exclusive right to reproduce one of his paintings. The plaintiff then took out a statutory copyright, and published photographic copies of the original, each bearing upon its face the notice of copyright. The original was never so marked. The defendant was printing lithographic copies of the painting. *Held*, that he may be enjoined. *Werckmeister v. American Lithographic Co.*, 34 N. Y. L. J. 991 (U. S. C. C., S. D., N. Y., Dec. 1905).

An artist has two distinct property rights in his paintings: first, the ownership of the physical substances; and, secondly, his common law copyright, consisting of the exclusive privilege of making copies until publication by him. It is well settled that he may assign this common law copyright, and that this assignment carries with it the right to secure the usual statutory copyright, even though the title to the painting itself is retained by the assignor. *Werckmeister v. Pierce & Bushnell Mfg. Co.*, 63 Fed. Rep. 445, reversed on another ground, 72 Fed. Rep. 54. This branch of the case, therefore, is unquestionably sound. Upon the further question, as to whether it is necessary for the protection of the assignee that the notice of copyright should be upon the original as well as upon the copies, there is a conflict of authority, due to a very ambiguous phrase in the statute. U. S. Rev. St., Act of June 18, 1874, c. 301, § 1. From the standpoint of statutory interpretation, the present decision, dispensing with the necessity of notice of copyright on the original, may perhaps be supported. From a practical standpoint, however, there is much to commend the opposite holding. *Cf. Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. Rep. 54. The purpose of the provision in the statute requiring notice on some visible portion of the copyrighted article is not only to warn persons that it is unlawful to make copies from the original, but also to warn purchasers that they cannot gain an absolute ownership. *Cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53. Inasmuch as a buyer of an original painting without such notice would be as likely to be deceived as the buyer of a copy, the requirement that notice should be affixed ought to apply to both. *Cf. King v. Force*, 2 Cranch (U. S. C. C.) 208.

CORPORATIONS — CHARTERS: GRANT — EXCLUSIVE RIGHTS: WHETHER GRANTED BY IMPLICATION. — A city contracted with a water corporation that the corporation should have a right to furnish water for thirty years, and that during that time the city would not grant the same right to any other person. *Held*, that this did not preclude the city itself from furnishing water within the specified period. *Knoxville Water Co. v. Knoxville*, U. S. Sup. Ct., Jan. 2, 1906.

For a discussion of the principles involved, see 16 HARV. L. REV. 68.

CORPORATIONS — FOREIGN CORPORATIONS — LICENSE TAX UPON INTRASTATE BUSINESS. — A statute of North Carolina imposed a license tax "upon every meat packing house doing business in this state." The plaintiff in error, a foreign meat packing corporation, shipped prepared products to its several storage plants in the state, from which the products were sold for intrastate consumption. *Held*, that the plaintiff in error is liable for the tax under the statute. *Armour Packing Co. v. Lacy*, U. S. Sup. Ct., Jan. 8, 1906.

It is well settled that a state may impose a license tax upon a foreign corporation as a condition of its doing business therein. *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171; see BEALE, FOREIGN CORP. §§ 509, 752. The maintenance of a resident sales agency is "doing business" within the meaning of these restrictive measures. *Cone v. Tuscaloosa Mfg. Co.*, 76 Fed. Rep. 891. The principal question involved in the case at hand is whether the plaintiff in error was carrying on that kind of intrastate business intended to be affected by

the statute. A foreign meat packing company doing any dissimilar kind of business within the state could scarcely be held liable for the tax imposed. Nor, on the other hand, would it be reasonable to require that all the company's activities must have been pursued within the state to bring it within the measure in question. The fair and natural interpretation of the Act is that every meat packing house must pay a license tax if any part of its characteristic business is carried on within the state. The general proposition, involved in the decision, that the selling of its products constitutes a part of any manufacturing business, is scarcely more than a mercantile truism, and brings the plaintiff in error clearly within the meaning of the statute. See *Stewart v. Kehrer*, 115 Ga. 184.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CREDITORS — FULL PAYMENT OF SHARES WITH PROPERTY. — Promoters, having options on a number of plants, with their good will, for \$2,250,000, sold the property to a corporation, formed for the purpose of consolidation, at a valuation of about \$5,000,000, paid in stocks, bonds, and some cash. The increased valuation was claimed to have been based on profits expected to be realized as a result of the pretended monopolization of the business. A New Jersey statute provided that stockholders were bound to pay unpaid shares whenever the capital was insufficient to satisfy creditors, but also allowed property to be purchased and stock to be issued "to the amount of the value thereof" in payment as full paid stock. A suit was brought by the receiver of the corporation on behalf of its creditors to recover payment on the stock ostensibly issued in exchange for the plants. *Held*, that prospective profits are not to be regarded as property under the statute. See *v. Heppenheimer*, 61 Atl. Rep. 843 (N. J. Ch.). See NOTES, p. 366.

DEATH BY WRONGFUL ACT — DAMAGES IN STATUTORY ACTION — LOSS OF PARENTAL CARE. — Under a statute allowing the personal representative of one killed by the wrongful act of another to sue for damages for the benefit of the widow and children, and providing that the sum recovered shall "one-half thereof go to the husband or widow, and one-half thereof to the children, of the deceased," the administrator sued. *Held*, that damages for the loss to the children of the parental care of the deceased cannot be recovered. *McCabe v. Narragansett Electric Lighting Co.*, 61 Atl. Rep. 667 (R. I.).

Under Lord Campbell's Act the amount recovered is apportioned among the beneficiaries in shares determined by the jury. Most American statutes provide that it be divided in the shares defined by the statute of distributions. Under either provision courts have almost unanimously allowed recovery for loss of parental care. *St. Lawrence, etc., Ry. Co. v. Lett*, 11 Can. Sup. Ct. 422; *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252. In construing the second form of statute most courts have held that its purpose is to compensate each beneficiary for the particular injuries suffered. See *Richardson v. New York, etc., R. R. Co.*, 98 Mass. 85. The illogical operation thereby given to the statute, by allowing damages for the separate injuries of each beneficiary and then distributing the whole in arbitrary shares among all the beneficiaries, has led some courts to adopt as the measure of recovery the amount which the deceased would probably have added to his estate. See *Railroad Company v. Barron*, 5 Wall. (U. S.) 90, 105; *Chicago, etc., R. R. Co. v. Woolridge*, 174 Ill. 330, 336. Even courts which adopt this latter view have inconsistently allowed recovery for loss of parental care. *Ittner Brick Co. v. Ashby*, 198 Ill. 562. The Rhode Island statute is so scantily worded as to leave in doubt the theory upon which recovery is based. Granting that the measure of recovery is the amount which the deceased would have added to his estate, as the court holds, damages for loss of parental care are clearly excluded.

DOMICILE — HUSBAND AND WIFE: POSSIBILITY OF SEPARATE DOMICILES. — The plaintiff was deserted by her husband, who is domiciled in West Virginia, and she thereupon removed to New York. She brought suit in the federal court for alienation of affections against the defendant, a citizen of West Virginia. *Held*, that a deserted wife may acquire a separate domicile

from her husband, and that the court therefore has jurisdiction because of the diversity of citizenship of the parties. *Gordon v. Yost*, 140 Fed. Rep. 79 (U. S. C. C., N. D., W. Va.).

The conceptions of domicile and citizenship have been closely assimilated in this country by the Fourteenth Amendment to the Constitution providing that a citizen of the United States shall be a citizen of the state where he lives. See *Dougherty v. Snyder*, 15 S. & R. (Pa.) 84. The domicile of a wife at common law is that of her husband. For the purpose of bringing suit for divorce, however, she can acquire a separate domicile, this exception being necessary to prevent condonation of the husband's offense. *Ditson v. Ditson*, 4 R. I. 87. Some authorities allow her this right under other circumstances. See *Dutcher v. Dutcher*, 39 Wis. 651, 659. The courts of one state, indeed, have abandoned the general rule altogether on the ground that a wife being *sui juris* may for all purposes acquire a domicile of her own. *Shute v. Sargent*, 67 N. H. 305. This extension seems on the whole to be ill-advised. The interests of the wife are protected if she is allowed to acquire a separate domicile whenever she seeks to terminate the marriage relation. Under all other circumstances the salutary rule based on the wife's duty to live with her husband should prevail. See *Dolphin v. Robins*, 7 H. L. Cas. 390; *Greene v. Greene*, 11 Pick. (Mass.) 410.

EJECTMENT — DISSEISIN REQUISITE TO MAINTAIN ACTION — ENCROACHMENTS ABOVE SURFACE. — A telephone company strung a wire over plaintiff's land without authority. *Held*, that ejectment lies to compel the removal of the wire. *Butler v. Frontier Telephone Co.*, 109 N. Y. App. Div. 217. See NOTES, p. 369.

EQUITY — JURISDICTION — RESTRAINT OF POLICE. — The plaintiff was proprietor of a "Raines Law" hotel and held a liquor license. A police captain stationed an officer before the establishment with orders to warn all persons about to enter that it was a disorderly house subject to raid at any moment and all persons found therein would be arrested. The plaintiff filed an affidavit denying that it was a disorderly house and prayed an injunction against the voluntary giving of such information by the officer. *Held*, that equity will not issue such an order, as it would be an unwarrantable interference with the duty of the police to prevent crime. *Delaney v. Flood*, 183 N. Y. 323.

As damage in this case would be irreparable, equitable relief should be granted unless contrary to public policy. The liquor traffic at best is fraught with grave public dangers and needs constant supervision to keep it within the law. Equity should not interfere with the police so as to paralyze this arm of public security or weaken a wholesome exercise of its powers. *Prendorill v. Kennedy*, 34 How. Pr. (N. Y.) 416. If equity granted this injunction and the charges proved true, it would have aided the commission of a crime. *Cf. Sterman v. Kennedy*, 15 Abb. Pr. (N. Y.) 201. Considering the conflicts between executive and judicial departments that would arise, the discretion necessarily vested in the police from the responsible character of their duties to prevent crime, the respect due the exercise of such discretion by other tribunals, and finally equity's reluctance to interfere with criminal proceedings, it is submitted that this is one of those cases where the right of the individual must yield to that of the public, and that chancery should in its discretion refuse jurisdiction. *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357.

ESTOPPEL BY DEED — TITLE BY ESTOPPEL: UNDER QUITCLAIM DEED. — The defendant Monahan gave the petitioner a quitclaim deed with a covenant of special warranty against all persons claiming under him. Title to the land was in R, from whom Monahan had undertaken to procure a conveyance through himself to the petitioner. Subsequently he did obtain a deed to himself from R. *Held*, that the after-acquired title passes from the grantor to the grantee, since the intention of the parties was to transfer the true title by the quitclaim deed. *In re Whitman*, 33 Banker & Tradesman 2734 (Mass. Land Ct.).

The American doctrine of estoppel by deed, limited to conveyances with covenants of warranty, applies to a quitclaim deed only if it purports to convey

the true title and not merely the grantor's present interest. *Hanrick v. Patrick*, 119 U. S. 156. Invariably, in order that title may pass by estoppel, the subsequently acquired paramount title must be from a source covered by the covenant; but in the present case the grantor did not claim under a title within the special warranty. *Cf. Bell v. Twilight*, 26 N. H. 401. Furthermore, as the deed was not ambiguous, the court was in error in looking at extraneous evidence to find that the intention of the parties was to pass the true title. *Muldoon v. Deline*, 135 N. Y. 150. Since the covenant of warranty did not cover the source of the later-acquired title, which to the knowledge of grantor and grantee was in a third party, the effect of the decision is to make a quitclaim deed without warranty, and which on its face does not purport to convey the true title, operate precisely like a warranty deed so far as the passing of a subsequently acquired title to the grantee is concerned — an apparently unsound extension of the doctrine of estoppel.

ESTOPPEL — ESTOPPEL IN PAIS — DIFFERENT, BUT NOT INCONSISTENT, STATEMENT OF POSITION. — The plaintiff presented a check at a bank and was told that the drawer had instructed the bank not to pay it. The bank, when sued, offered to prove that the drawer had no funds on deposit when the check was presented. *Held*, that the evidence is inadmissible, as the bank is estopped to set up a different defense from the one stated when payment was refused. *First State Bank of Overton v. Stephens Bros.*, 105 N. W. Rep. 43 (Neb.).

It is difficult to find estoppel in this case. A necessary element of estoppel is reliance upon the representation. *Lingonner v. Ambler*, 44 Neb. 316. Had the plaintiff relied upon the representation, he would not have sued, for, if true, it would have defeated his action. *Dykens and Van Alstyne v. The Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612. Even if the bank were estopped to deny the representation, the offered evidence would be admissible, for showing that the drawer of a check has no funds on deposit is not inconsistent with saying that he stopped payment. Banks frequently honor overdrafts. This peculiar doctrine of estoppel first appears in Nebraska in a *dictum*, following a *dictum* of the United States Supreme Court. *Ballou v. Sherwood*, 32 Neb. 666. The Supreme Court lays down the broad principle that if a party states one reason for his conduct during the transaction, he is estopped to introduce another at the trial. *Railway Co. v. McCarthy*, 96 U. S. 258. A series of New York cases are cited by the Supreme Court holding that a bailee, after claiming title in himself, cannot set up his lien for charges when sued for conversion. The cases are plainly right in holding the lien forfeited; but they fail to support the broad principle which the court bases upon them. Unfortunately, the *dictum* has been followed literally in several states.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — EXECUTORSHIP DISTINGUISHED FROM A TRUST. — A testator bequeathed all his property to his wife and daughter and appointed his wife sole executrix. The daughter, the present plaintiff, who was one year old at the time of her father's death, attained her majority in 1876. Though she was not ignorant of the provisions of the will, this action against her mother's executors for an accounting was not brought until 1903. *Held*, that the action is statute-barred. *In re Mackay*, [1906] 1 Ch. 25.

All executors except those who are express trustees are protected by the Statute of Limitations (37 & 38 Vict. c. 57, § 8). *In re Rowe*, 58 L. J. Ch. 703. An executor can become an express trustee, apart from the provisions of the will, only by his own declaration that he holds in trust. *In re Davis*, [1891] 3 Ch. 119. The question arises whether the disability of a legatee, arising from his infancy, will make the executor an express trustee by force of the will. In such a case, an executor has been held a trustee within the purview of a statute defining the powers of a trustee for an infant. *In re Smith*, 42 Ch. D. 302. But that case should not be deemed controlling, since it merely involved an interpretation of the provisions of the Conveyancing Act. Moreover, the word trustee is often used in a loose sense to include executors, while the Statute of

Limitations in question has been held to run in favor of all executors not express trustees. *In re Barker*, [1892] 2 Ch. 491. Moreover, the opposite view would seem to make all executors and administrators trustees for legatees under disability, a position for which no authority has been found. *Cf. In re Davis, supra*.

JUDGMENTS — COLLATERAL ATTACK — ATTACK ON PROBATE DECREE FOR WANT OF JURISDICTION. — In Wisconsin a statute provided that when any person should die intestate leaving property within the state, the county court having jurisdiction should grant administration. A county court issued letters of administration to the plaintiff; but upon his bringing suit for causing the death of the intestate, the defendant alleged that such court had acted without jurisdiction since the deceased left no property within the state. *Held*, that the finding of the county court cannot be thus collaterally impeached, and that, moreover, there are sufficient facts to uphold its jurisdiction. *Jordan v. Chicago, etc., Ry. Co.*, 104 N. W. Rep. 803 (Wis.).

An alleged judgment of the court of a sister state can always be attacked collaterally on the ground that such court was without jurisdiction. The reason generally given is that under such circumstances there exists no valid judgment entitled to recognition. See *Thompson v. Whitman*, 18 Wall. (U. S.) 457. This reasoning has been applied to alleged judgments of domestic courts. *Ferguson v. Crawford*, 70 N. Y. 253; but see, as to surrogates' courts, N. Y. Code Civ. Proc. § 2473. Under this theory any judgment should be assailable for lack of jurisdiction. See *Pollard v. Wegener*, 13 Wis. 569. Hence at common law a probate decree for the administration of the estate of a living person may be collaterally impeached. *Scott v. McNeal*, 154 U. S. 34. Of such an estate, it is evident that no probate court whatever can have jurisdiction. But by the great preponderance of authority other domestic judgments of a superior court of general jurisdiction, usually including probate decrees, cannot be questioned except by a direct proceeding for the purpose, unless their invalidity appears upon the record. *Cook v. Darling*, 18 Pick. (Mass.) 393. Their very validity is conclusively presumed as against collateral attack. The illogical difference in treatment between a domestic and a foreign judgment may be justified by the demand for a stable system of justice and by the comparative ease with which a domestic judgment can be directly overthrown.

JUDGMENTS — SETTING ASIDE AND VACATING JUDGMENTS — VACATION OF JUDGMENT OF DIVORCE AFTER DEATH OF A PARTY. — A husband procured a decree of divorce against his wife. After his death the wife moved to have the decree set aside on the ground that the court acted without competent jurisdiction, and gave notice of this motion to his executors. *Held*, that the decree should not be set aside. *Dwyer v. Nolan*, 82 Pac. Rep. 746 (Wash.).

Some courts hold that a decree of divorce is final and can never be set aside because of the extensive collateral effect on third parties. *Parish v. Parish*, 9 Oh. St. 534. But the general rule is that a judgment in a divorce suit, like that in any other, will be vacated on a proper application showing good cause. *Johnson v. Coleman*, 23 Wis. 452. However, since divorce involves a personal relation, the courts, after the death of either party, will entertain no proceedings looking to the further settlement of the right of divorce *per se*. *O'Hagan v. Executor of O'Hagan*, 4 Iowa 509. But when property rights are dependent upon the validity of the decree, it is held to be open to review. *Rawlins v. Rawlins*, 18 Fla. 345. The proper method of procedure, however, is not to move in the same cause and give notice to the executor, but to sue out an original bill joining as defendants the executor, heirs, and all others in interest. *Watson v. Watson*, 1 Hun (N. Y.) 267. The plaintiff's error, therefore, was in failing to use this method of procedure.

LANDLORD AND TENANT — COVENANT IN LEASE — RIGHT OF THIRD PARTY UNDER COVENANT TO REPAIR. — The defendant demised an unfurnished house to the plaintiff's husband, without any covenant to repair, but

later agreed with him to repair the kitchen floor. The defendant failed to repair, and the plaintiff was injured by reason of the defect. *Held*, that the plaintiff has no cause of action against the defendant. *Cavalier v. Pope*, 43 L. T. R. 475 (Eng., C. A., Aug. 9, 1905).

In general the duty of a landlord to put the demised premises in safe condition rests solely upon special contract, unless the particular circumstances of the case are sufficient to raise that duty independently. *Witty v. Matthews*, 52 N. Y. 512. Where the landlord is under no duty to make the premises safe, he is not responsible for injuries caused during the term by a defect therein, even though the premises were defective when let, unless the defect were peculiarly within his knowledge. *Lane v. Cox*, [1897] 1 Q. B. 415; *Robbins v. Jones*, 15 C. B. N. S. 220. Even where the landlord has covenanted to repair, he is not in general liable in tort for injuries caused by his breach of covenant, since ordinarily such breach is not negligence. *Sanders v. Smith*, 5 N. Y. Misc. 1; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169. But if, by reason of the failure to repair according to the covenant, the premises become a public nuisance, and one of the public is injured thereby, then, to avoid circuitry of action, the injured party may be allowed to proceed directly in tort against the landlord. See *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277. In the principal case no public nuisance was created, nor was the plaintiff a party to the covenant; consequently she could not recover. *Cf. Sterger v. Van Sicklen*, 132 N. Y. 499.

LANDLORD AND TENANT — ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE. — A dispute arose between A and the plaintiff concerning the present right to certain land. The defendant, who had entered into possession under a lease from A, to avoid a threatened ejectment by the plaintiff, accepted a lease for years from him, though he continued also to hold under A. After expiration of the term demised by the plaintiff, he remained in possession as A's tenant, paying no rent to the plaintiff, or otherwise acknowledging him as landlord, though he did no affirmative act to terminate the tenancy. The plaintiff sued out a writ of distress for rent from the expiration of the term demised by him. *Held*, that he cannot recover. *Hodges v. Waters*, 52 S. E. Rep. 161 (Ga.). See NOTES, p. 375.

LEGACIES — LAPSED BEQUESTS — APPLICATION OF STATUTE PREVENTING LAPSE. — A statute provided that when any estate should be bequeathed to a child of the testator and such child should die during the testator's lifetime, leaving a descendant who should survive the testator, such legacy should not lapse but should vest in the surviving descendant of the legatee. A testator, by his will, directed the payment of \$500 "to each of my children." *Held*, that the surviving child of one of the testator's children who had died, as the testator knew, before the making of the will, is not entitled to \$500. *Pimel v. Betjemann*, 183 N. Y. 194.

This decision reverses that of the lower court, which was adversely commented upon in 18 HARV. L. REV. 622.

MARRIAGE — NULLIFICATION — ALIMONY PENDENTE LITE. — In an action brought by a wife against her husband to annul the marriage, the wife applied for alimony *pendente lite*. *Held*, that the application for alimony is inconsistent with the plaintiff's contention that the marriage is a nullity, and is accordingly denied. *Jones v. Brinsmade*, 34 N. Y. L. J. 829 (N. Y., Ct. App., Dec. 5, 1905).

In the absence of a statute so providing, the allowance of alimony *pendente lite* is generally not a matter of absolute right, but rests in the discretion of the court. *Glasser v. Glasser*, 28 N. J. Eq. 22. By the weight of authority it is necessary that the existence of the marriage relation should be admitted or shown as a prerequisite to the granting of alimony *pendente lite*. *Collins v. Collins*, 80 N. Y. 1. But a judgment annulling a marriage in effect declares that a valid marriage never existed between the parties. *Chase v. Chase*, 55 Me. 21. The plaintiff in the case at hand denies the first prerequisite of her petition for alimony. Reason, therefore, as well as authority is opposed to granting her

application. *Meo v. Meo*, 2 N. Y. Supp. 569; *Taylor v. Taylor*, 7 Colo. App. 549. There is, however, authority for granting alimony *pendente lite* to the wife in a suit by the husband to annul the marriage. *Vroom v. Marsh*, 29 N. J. Eq. 15. But that case is the converse of the present, since the party seeking alimony is the party who supports the validity of the marriage.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — LIABILITY, AS OWNER, FOR TRESPASS OF ANIMALS. — Through the negligence of an employee of the city fire department, a horse escaped from custody and trespassed upon the plaintiff's lawn. *Held*, that the city is not liable, the conduct of the fire department being a governmental function. Two justices dissented. *Cunningham v. City of Seattle*, 82 Pac. Rep. 143 (Wash.).

The non-liability of a municipal corporation for negligence in the administration of purely governmental functions is well established. Whether this immunity should extend to negligence in the construction and maintenance of buildings devoted to such functions is a subject of considerable conflict, though the weight of authority seems to be with the extension. *Kelley v. Boston*, 186 Mass. 165; *Gray v. Griffin*, 111 Ga. 361; *contra*, *Powers v. Philadelphia*, 18 Pa. Super. Ct. 621. The case above noted presents for the first time, it is believed, the question whether that absolute liability which the common law imposes for trespasses of animals should rest upon a municipal corporation owning such animals only in connection with governmental activities. No reason is perceived why authorities which extend the municipality's immunity to the negligent maintenance of public buildings should not further extend it to include the present facts. It is the general tendency of western jurisdictions, moreover, to deny the application to their conditions of the common-law doctrine relative to absolute liability for the trespass of animals. *Wagner v. Bissell*, 3 Ia. 396. And § 2546 of the Washington General Statutes of 1891 contains a provision looking in the same direction. But it would seem that public policy is sufficiently satisfied by such a limitation of the municipality's immunity as would exclude this case.

PARENT AND CHILD — PARENT'S RIGHT TO CUSTODY — JUVENILE COURT ACTS. — The county court was authorized by statute to commit to certain state homes for children any delinquent child. A delinquent child was defined as any child under sixteen years of age who violates any law, is incorrigible, knowingly associates with thieves, vicious, or criminal persons, is growing up in idleness or crime, etc. The son of the petitioner was committed to a home for boys during his minority, or until he should be legally discharged, for having committed two criminal assaults. The father brought a writ of *habeas corpus* on the ground that the commitment was unconstitutional, and proved that he could provide a good home for the child. *Held*, that the detention is illegal. *People v. McLain*, 38 Chi. Leg. N. 166 (Ill., Sup. Ct., Dec. 20, 1905). See NOTES, p. 374.

PARTNERSHIP — DISSOLUTION AND WINDING-UP — RECEIVER'S COMPENSATION AS SUBJECT TO SET-OFF. — The defendant, a partner in a firm, had been appointed receiver thereof on the usual terms. The partnership accounts showed that the defendant was an insolvent debtor to the firm for £1400. The master had allowed him £280 for his remuneration as receiver, which it was contended should be set off against the debt the defendant owed to the partnership. *Held*, that the defendant is entitled to his compensation as receiver without regard to this debt. *Davy v. Scarth*, [1906] 1 Ch. 55.

In order to have a cancellation of obligations by set-off, both of such obligations must have arisen between the immediate parties to the action or their privies. See WATERMAN, LAW OF SET-OFF, 1st ed., § 133. In the present case the court failed to find that the obligations had so mutually arisen because of the intervention of the court itself in appointing the defendant as receiver. After his appointment the defendant was an officer of the court. The court, then, having sanctioned this arrangement, became honorably responsible for the payment of his compensation, irrespective of any debts which the defendant owed to the partnership as an individual. On a similar principle it has been held that when a

receiver sues in his representative capacity for the purchase price of property sold, the purchaser cannot set off a private debt due from the receiver even to the extent of the latter's commissions from the sale. *Polk v. Coal & Mining Co.*, 91 Ia. 570. Though the present case is supportable on the court's reasoning, it would seem that the set-off might have been allowed, as both obligations may be considered, for all practical purposes, to have arisen between the same parties. *In re Union Bank*, 37 N. J. Eq. 420.

PARTNERSHIP — NATURE — PARTNERSHIP FOR SINGLE TRANSACTION. — The plaintiff, the defendant, and two others agreed among themselves to purchase jointly a certain piece of real estate, taking title in the defendant's name, to resell it and to divide the profits. The plaintiff procured a purchaser, but the defendant refused to convey at the price offered, whereupon the plaintiff brought this action at law. *Held*, that the agreement between the parties created a partnership, and that the plaintiff's remedy is therefore in equity to terminate the relation and for an accounting. *Mitchell v. Tonkin*, 109 N. Y. App. Div. 165.

The entering together as joint principals upon a continued series of transactions constituting a course of business would generally be held sufficient to constitute a partnership. *Chester v. Dickerson*, 54 N. Y. 1. A certain degree of complexity and continuity should characterize the relation. This may plainly be present, although the dealings are to be with respect to a single *res*, as where a tract of land is to be bought, subdivided, and retailed. *Winstanley v. Gleyre*, 146 Ill. 27. But if the agreement is for a simple transaction, as for a purchase and sale in gross, it seems unnecessary to find a partnership and to annex the consequences of that relation. *Clark v. Sidway*, 142 U. S. 682; see *Gottschalk v. Smith*, 156 Ill. 377. Yet, as this distinction is not often taken, the present case has the support of most of the authorities. See *Yeoman v. Lasley*, 40 Oh. St. 190; *Spencer v. Jones*, 92 Tex. 516.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — PAYMENT OF TAXES BY LESSOR. — Under a lease of land, without buildings, the lessor covenanted to save the lessee harmless for all taxes upon "said premises." The lessee subsequently erected buildings, which were to be his own property. The lessor paid the tax, assessed as an entire tax, on land and buildings, and sought to recover from the lessee the proportion assessed against the latter's buildings. *Held*, that he can recover. *Phinney v. Foster*, 189 Mass. 182.

The court interpreted the covenant to save harmless to apply only to the lot, so that, as between lessor and lessee, the tax on the buildings was intended to be borne by the lessee. Yet, since the tax was not apportionable, the latter resisted the claim because no legal liability towards the city existed against him. But payment of the tax released the lien on the lessee's buildings — his property was bound, though not he personally. *Cf.* Mass. R. L. c. 12, § 60 and c. 13, § 35; *McGee v. Salem*, 149 Mass. 238. The plaintiff thus brought himself within two well recognized doctrines of quasi-contracts: recovery for satisfaction of the defendant's obligation (here a real one) to redeem the plaintiff's property from an encumbrance referable to the defendant's non-payment; and secondly, for payment of a claim which in justice, as between the parties, was owing from the defendant. **KEENER, QUASI-CONTRACTS c. 9.** So, recovery has been allowed for taxes for which the defendant was not personally liable but which he expressly agreed to pay. See *Lageman v. Kloppenburg*, 2 E. D. Smith (N. Y.) 126. And similarly, in an analogous case, when there was no statutory provision for apportionment of taxes between the tenant by dower and the reversioner, an equitable apportionment has been enforced. *Graham v. Dunigan*, 2 Bosw. (N. Y.) 516; see also *Linden v. Graham*, 34 Barb. (N. Y.) 316. Of course, payment of taxes by a volunteer gives no right to reimbursement.

RESTRAINT OF TRADE — CONTRACTS TO EMPLOY ONLY UNION MEN — VALIDITY. — *Held*, that a contract between an employer, union laborers, and

their labor union, which provided that only members of the union in good standing should be employed or should continue in employment, is valid, and a note given by the employer to secure his performance is collectible. Two judges dissented. *Jacobs v. Cohen*, 183 N. Y. 207. See NOTES, p. 368.

SALES — CONDITIONAL SALES — RISK OF LOSS. — A horse was sold and delivered on condition that the vendor should retain title until he received payment in full. The horse died without fault of the vendee before part of the purchase price became due. *Held*, that the vendor may recover such balance. *Lavalley v. Ravenna*, 62 Atl. Rep. 47 (Vt.).

On the question involved in this case there is a sharp conflict of authorities. *Cf. Tufts v. Griffin*, 107 N. C. 47; *Bishop v. Minderhout*, 128 Ala. 162. The present decision, however, is supported by the weight of authority and seems correct on principle. See 14 HARV. L. REV. 626. In the ordinary conditional sale the practical import of the agreement is that the buyer shall immediately receive all of the incidents of ownership except the bare legal title. He obtains not only the possession but also the use and enjoyment of the commodity sold. If he refuses to make the stipulated payments, he is liable in an action for goods sold and delivered. *Smith v. Aldrich*, 180 Mass. 367. Similarly, the seller cannot, by refusing to receive the money due, repudiate the transaction and limit his liability to a personal action. See *Carpenter v. Scott*, 13 R. I. 477, 479. As the parties have in mind the same results that would be attained by a transfer of title and a mortgage back to the seller, the legal results should be the same if possible. The transaction is accordingly regarded as executed rather than executory. See 9 HARV. L. REV. 106, 109. Reason and consistency with the mortgage analogy plainly require that the risk should follow the beneficial ownership rather than the security title.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — ATTACHMENT OF GOODS IN POSSESSION OF BAILEE. — A consignor took a bill of lading to his own order and pledged it. His creditor later attached the goods in the possession of the carrier. *Held*, that the pledgee's lien prevails over the attachment. *Kentucky Refining Co. v. Bank of Morilton*, 89 S. W. Rep. 492 (Ky.). See NOTES, p. 370.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — CONSIGNMENT TO BUYER: DRAFT FOR MORE THAN CONTRACT PRICE. — Under a contract of sale the defendant shipped flour to the plaintiff. The bill of lading, made out to the plaintiff as consignee, was sent to a bank, with a draft attached for a sum larger than the contract price. The plaintiff sued the defendant for breach of contract, attaching the flour as the property of the defendant, in order to gain jurisdiction over the defendant, who was a non-resident. The defendant moved to dissolve the attachment on the ground that title to the flour was in the plaintiff. *Held*, that as the defendant had indicated intention to retain title by sending the bill of lading to the bank, he is still the owner. *Greenwood Grocery Co. v. Canadian, etc., Co.*, 52 S. E. Rep. 191 (S. C.).

In this class of cases the seller clearly indicates an intent to retain some control over the property when he forwards the bill of lading and a draft together. The court holds, on the common law theory, that the bill of lading is mere evidence of the intent of the parties; and as that evidence is rebutted in the present case, the title never passed from the seller. The mercantile theory is that the title follows the form of the bill of lading, so that here the buyer would have title, while the seller retains a lien by his possession of the bill. See 18 HARV. L. REV. 307. The latter theory, though comparatively modern, is generally preferable, as it allows the purchaser or lender to rely with safety upon the form of the bill. However, it seems that, even by the mercantile theory, no title passed to the buyer on the peculiar facts of the present case. The consent of both parties is necessary for passing title; and here there can be implied no consent on the part of the buyer to accept a title encumbered by a lien for a sum greater than the contract price.

TORT — NEGLIGENCE — LIABILITY OF CONTRACTOR TO THIRD PARTIES. — Under a contract with county commissioners, a bridge company, knowing of latent defects in a bridge, turned it over to the commissioners, who opened it for public use. The plaintiff, a stranger to the building contract, in passing over the bridge sustained personal injuries due to the latent defects. *Held*, that the bridge company is liable to the plaintiff for the injuries suffered. *Casey v. Hoover*, 89 S. W. Rep. 330 (Mo., Kansas City Ct. App.). See NOTES, p. 372.

WASTE — RIGHT OF LIEN-HOLDER TO BRING ACTION AT LAW. — The defendant, being in possession of land upon which, as he knew, rested a heavy lien for unpaid taxes, removed a building, thereby rendering the real estate insufficient to answer for the assessments. *Held*, that he is liable to an action for waste at the suit of the county. *Lancaster County v. Fitzgerald*, 104 N. W. Rep. 875 (Neb.).

An injunction against such waste as would impair the security has been obtained by a judgment creditor with a lien upon land, and by one who has levied an attachment before suit begun. *Jones v. Britton*, 102 N. C. 166; *Camp v. Bates*, 11 Conn. 50. The law which gives a lien must, to give it value, protect it from the danger of interference which may result in injury to the plaintiff. On the other hand, it has been frequently said that to support a common law action of waste, or in the nature of waste, a legal title is necessary. See *Webb v. Boyle*, 63 N. C. 271. Yet a mortgagee has been allowed to sue even in states where he secures only a lien upon the mortgaged property. *Van Pelt v. McGraw*, 4 N. Y. 110; *Jackson v. Turrell*, 39 N. J. Law 329. A lienholder possesses a substantial interest, so that at least where a defendant has, as in the principal case, knowingly impaired that security-interest by conduct not in the ordinary enjoyment of the premises, he seems to have committed a tort which should render him liable. See *Yates v. Joyce*, 11 Johns. (N. Y.) 136.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

LIABILITY OF STOCKHOLDERS AS PARTNERS WHEN INCORPORATION IS DEFECTIVE. — A recent article attempts to place upon a reasoned basis this doctrine, which some courts have adopted as a desirable result. *Are Defectively Incorporated Associations Partnerships?* Francis M. Burdick, 6 Columbia L. Rev. 1 (Jan., 1906). The writer maintains that a creditor of a supposed corporation, upon discovering the incorporation to be defective, can sue the stockholders as partners upon the principle by which a creditor of a partnership recovers against a dormant partner. Where shares of stock are issued but the attempt to incorporate fails, there is lacking no element necessary to a partnership in fact if "the common business is carried on with the capital thus contributed; by agents designated by the contributors in accordance with the will of the contributors and for their profit." If these elements are present, the absence of an "intention to incur the liabilities of partners . . . does not prevent the existence of a partnership." Professor Burdick denies that any reason exists for applying the rule that the validity of a corporation shall not be attacked collaterally, in an action to charge the stockholders with partnership liability.

The majority of the American decisions deny the existence of this general liability of stockholders as partners when incorporation is defective. See BURDICK, PARTNERSHIP 34. That no such liability is incurred by stockholders who succeed in creating a corporation *de facto* seems now to be well established. *Stout v. Zulick*, 48 N. J. Law 599; *Finnegan v. Noerenberg*, 52 Minn. 239. Professor Burdick's argument against the application of the rule prohibit-

ing collateral attack upon the validity of a corporation *de facto*, seems to indicate that he regards even shareholders in a corporation *de facto* as partners; and this view is expressly stated in his treatise on Partnership (pp. 33, 34). This statement, however, leads to the result that both a partnership in fact and a corporation *de facto* exist, in each of which the property acquired in the course of the business would vest. The writer's test of a partnership quoted above seems also to be equally well satisfied whether or not the stockholders succeed in organizing a corporation *de facto*.

Professor Burdick very properly points out the fallacy of assuming that a partnership in fact is not formed because the individuals associated intended not to incur the liability of partners. In his treatise (p. 15) he identifies the "specific intent to form a partnership" and the "specific intent to incur the liabilities of partners," and decides that neither "is necessary to the existence of a partnership." In the present article he states that "the partnership relation cannot be instituted without the assent of the parties thereto." Just what is meant by assenting to the formation of the partnership relation without specifically intending its formation, is not clear. It is submitted that although it is not necessary that parties intend to incur partnership liability, it is necessary that they intend to form the relation which the law calls a partnership. The relations of shareholder to corporation and of partner to firm are each a distinct *status*; each is a distinct relation in fact to which the law annexes certain rights and liabilities. The intention not to incur a certain form of liability for an act can no more enable a person entering into the partnership relation to escape the liability of a partner than it can enable a person entering into the marital relation to escape liability for certain debts contracted by his wife. In each case the individual merely mistakes one of the legal consequences of his act of assenting to enter into the relation; but because the law attaches to an act a consequence not specifically intended does not render it less necessary that the act itself be intended in order to give it any legal effect. Whether an individual assents to enter into the partnership relation is obviously a question of fact. The validity of Professor Burdick's proposition requires this conclusion of fact: that an individual by the mere act of purchasing a share of stock in a concern engaged in business, which he honestly believes to be a corporation but which is in fact defectively incorporated, gives his assent to enter into the partnership relation. But the assent to enter into the relation of a voluntary arrangement for the purpose of carrying on business as associated individuals, as a question of fact, can hardly be spelled out of the mere act of an individual in purchasing stock in a going concern believed by him to be a corporation. The result of his act, if no corporation exists, may well be that no relation at all is created.

Nevertheless, although neither a partnership in fact nor a corporation exists, it does not follow that stockholders and officers of a supposed corporation who have participated in the negotiation of a contract will not be liable thereon. The facts in such a case seem sufficient to imply a warranty of authority to act for the proposed corporation and to create liability for the breach thereof according to the general principle in cases where one assumes without authority to act as an agent. *Seeberger v. McCormick*, 178 Ill. 404; *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83. See PARSONS, PARTNERSHIP, 4th ed., §§ 56, 57.

It is much to be regretted that Professor Burdick in his article did not discuss certain questions as to the nature of a corporation which are suggested by his conclusions. If the shareholders of a defectively incorporated association are partners in fact, they should have the rights as well as the liabilities of partners. Hence they should be able to sue as partners. *Jones v. Aspen Hardware Co.*, 21 Colo. 263. If the stockholders whose attempt to create a corporation has failed by reason of non-compliance with the terms of the statute of incorporation are partners in fact, do the stockholders whose attempt succeeds continue a partnership in fact with merely certain attributes, including limited liability, annexed by the statute? See JAMES PARSONS, PRINCIPLES OF PARTNERSHIP, 2d ed., § 24. If this question be answered in the affirmative, inasmuch as a statute merely limiting liability can have no extra-territorial operation, the stockholders, remaining partners in fact, would be liable as such

for corporate acts done outside the state of charter. This result is reached in a Florida decision. *Taylor v. Branham*, 35 Fla. 297. Likewise an *ultra vires* act would seem to be impossible; the liability for an act exceeding the provisions of the charter would depend upon the principles determining a partner's ability to bind the firm. The stockholders would enjoy limited liability only for acts done within the powers conferred by the charter; for acts done by them in excess of these powers they would remain liable as partners to an unlimited extent. This result, it is believed, has been reached by no decision. Upon this hypothesis as to the nature of a corporation, the doctrines that a corporation has an existence outside the state of charter, and has the capacity to perform legally unauthorized acts, would be at least superfluous; the acts performed outside the state of charter or in excess of authority would be valid acts of a partnership. See MORAWETZ, PRIVATE CORPORATIONS, 2d ed., § 748.

PRINCIPAL'S LIABILITY TO THIRD PERSONS FOR AGENT'S DECEIT. — In the development of the law of agency numerous conflicting decisions have been reached as to the principal's liability for an agent's deceit where there has been no authorization express or implied. Much of this confusion seems to have arisen from the tendency of the courts to take it for granted that the action of deceit is to be governed by the rules applying to contracts made by an agent rather than by those controlling in cases of tort. In presenting a careful examination of the cases and working out a theory by which to test the decisions, a recent writer has helped to clarify the situation. *Liability for the Unauthorized Torts of Agents*, by Wm. R. Vance, 4 Mich. L. Rev. 199 (Jan., 1906).

Though the title to the article would indicate a broader scope, Professor Vance has confined his discussion mainly to actions for deceit. The question commonly arises in litigation for damages caused by the over-issue of stock certificates, or by the fraudulent issue of bills of lading. The agent of a corporation, for example, having charge of the issue of certificates of stock, for his own purposes issues spurious certificates, which are presented to a bank as collateral for a loan. The officers of the bank, on being informed by the agent that the certificates are genuine, advance the money. Or, the agent of a railway company fraudulently issues a bill of lading without having received the goods described therein. This bill comes into the hands of an innocent indorsee for value, who upon the non-delivery of the goods brings an action of deceit against the company. In these cases there is no apparent authority given by the principal to do the acts complained of. Yet some states have allowed recovery on the ground that the agent had an apparent authority by his own representations, so that the principal is now estopped to deny lack of authority in him. Professor Vance in saying that there can be no estoppel against the principal based on an unauthorized representation of authority made not by himself but by the agent, makes a proper criticism of this reasoning.¹ On the other hand, the English doctrine, followed by the Supreme Court in the case of bills of lading and approved of in the case of fraudulent issue of stock, denies liability because of the absence of any authority whatever in the agent. *Grant v. Norway*, 10 C. B. 665; see *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 415. If any authority from the principal is necessary in order to create liability, these cases are supportable. Professor Vance, however, submits that since the act complained of is not contractual in its nature, but tortious, the question of liability should depend not upon authority conferred, or apparently conferred, but solely on whether the agent is acting in the course of his employment — the ordinary rule in cases of torts.

The difficulty, then, is to determine whether the agent is in fact acting within the scope of his employment. In the case of the over-issue of stock it would

¹ The result in many of the cases may, however, be supported on the ground that the principal was negligent. See *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30.

appear to be plainly the duty of the agent to give just such information as that upon which the holder of the spurious stock has relied, since one of the chief purposes for which a corporation is organized is to enable the shares to be transferred freely. The very essence of such a certificate is an assurance to the world that it will be transferred on the books of the company upon the surrender of the certificate. If a bill of lading is to be regarded simply as a receipt to enable the consignor to trace and receive his goods as an incident of transportation, a representation by the agent to third persons would be outside the scope of the employment and would not bind the principal. See *C. N. O. & T. P. Ry. Co. v. Citizens' National Bank*, 56 Oh. St. 351. But in view of the widespread use of the bill of lading as a symbol of property, it seems better to regard it as analogous to a negotiable instrument, relied upon by third parties in much the same way as stock certificates. Professor Vance's conclusions that the principal should be liable in both classes of cases seem, accordingly, correct.

One limitation must, however, be made to the theory that the rules governing the principal's liability for deceit by the agent are the same as those which govern liability for any other tort. It should be noticed that deceit is an anomalous tort, since the situation created resembles that created when the agent makes a contract with a third party in that the latter acts upon a representation of the agent, and thus in a sense co-operates to cause the damage. See HUFFCUT, AGENCY, 2d ed., 12, 13. Consequently, though the question of the principal's liability for the agent's deceit does not depend primarily upon authority conferred as in contract, yet if it appears that the third party knew that the principal had forbidden such a representation, he should not be allowed to hold the principal, because he is not dealing with the agent as agent, and hence is not deceived. See *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519.

NATURALIZATION. — An article by Henry Stockbridge is called forth by the recent Act of Congress denying citizenship to aliens of anarchistic inclinations, 32 U. S. Stat. at L. 1222 (March, 1903), and by the rulings of two state courts, — one in New York, which declared that it would naturalize nobody unable to speak English, and one in Pennsylvania refusing to admit to citizenship anybody who could not prove that he had abstained from participation in the coal-strike riots. *The Law of Naturalization*, by Henry Stockbridge, 17 Green Bag 644 (Nov. 1905); 13 Am. Lawyer 419 (Oct. 1905). The author summarizes the history and present state of the law of naturalization, comments on its lax enforcement, and concludes that neither the statute nor the rulings above referred to were really extensions of the pre-existing law. Congress, under the clause of the Constitution giving it power to establish a uniform rule of naturalization, has enacted that every applicant for admission should prove that during the five years of his probation "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the peace and happiness of the same." U. S. Rev. Stat. § 2165. It is to be noticed that the test in the revised statutes is objective. The applicant must prove that he has *behaved* as one possessing the attributes mentioned. Mr. Stockbridge is, therefore, not strictly accurate when he says that the statute requires the applicant actually to possess such attributes. It is true that in a Texas state court an applicant was rejected because his socialistic views as to the ownership of property were thought inconsistent with the Constitution, though no objection was raised to his behavior. See *Ex parte Sauer*, 81 Fed. Rep. 335 (note). This case is, however, inconsistent with the result of a later case in a United States district court in the same state. See *Re Rodriguez*, 81 Fed. Rep. 337. There an honest, industrious, and well-behaved Mexican was naturalized, though he could neither read nor write, and was "lamentably ignorant." The court said of him that "by his daily walk . . . he . . . emphasized his attachment to the principles of the Constitution," thus plainly abandoning the subjective test. The statute of 1903 made the distinct advance of forbidding

admission to those disbelieving in all organized government, whatever their behavior might be.

So also in the case where the applicant was required to prove non-participation in a coal riot, it is questionable whether an extension of the law has not been made. A man guilty of committing a felony has been held not a person of good moral character and attached to the Constitution. *Re Spencer*, 52 Saw. (U. S. C. C.) 195. In the same case there was a *dictum* that repeated lesser breaches of the law would have the same effect; but a single misdemeanor has apparently never before excluded a man from citizenship. Surely one instance of yielding to the common propensity for doing what the crowd does, is not necessarily behavior incompatible with good character and a belief in the Constitution.

Still more doubtful is the ruling that no one shall be naturalized unless he can speak English. That such persons would, as a rule, be undesirable citizens is true, but that they should be excluded under the statute is not clear. Obviously such a person may have "behaved" as required by the statute, — may even be of good moral character, and may have, in fact, a greater knowledge of and belief in the principles of the Constitution in French or Hebrew than most successful English-speaking applicants. Why not, then, let him prove it if he can, and enjoy the privileges which the statute offers him, till the law is changed?

"AGENCY BY ESTOPPEL": a Reply. *Walter Wheeler Cook*. 6 Columbia L. Rev. 34. See 18 HARV. L. REV. 400.

ARE DEFECTIVELY INCORPORATED ASSOCIATIONS PARTNERSHIPS? *Francis M. Burdick*. 6 Columbia L. Rev. 1. See *supra*.

CASE OF NORTHERN ASSURANCE COMPANY *v.* GRAND VIEW BUILDING ASSOCIATION, 183 UNITED STATES REPORTS, THE. *Ashley Cockrill*. Containing a good collection of authorities on the question of whether or not an insurance company is bound by provisions not in the policy. 13 Am. Law. 524.

CONSTITUTIONAL PROVISIONS AGAINST FORCING SELF-INCRIMINATION. *Henry T. Terry*. 15 Yale L. J. 127.

DIVORCE IN THE TRANSVAAL. *C. F. Rorke*. Analyzing the rulings of the South African courts in regard to the law of domicile in divorce proceedings, and discussing malicious desertion as a ground for divorce. 22 S. African L. J. 399.

ENLARGEMENT OF A LIFE ESTATE BY AN ACCOMPANYING POWER OF DISPOSITION IN FEE. *Anon.* Full collection of authorities. 62 Cent. L. J. 25.

FEDERAL REGULATION OF QUARANTINE. *W. E. Walz*. Maintaining that Congress has control over quarantine, so far as interstate and foreign relations are concerned, under the commerce clause of the Constitution. 4 Mich. L. Rev. 189.

INTERESTS DETERMINABLE ON BANKRUPTCY. *Anon.* Discussing how far clause determining debtor's interest in the event of bankruptcy shall be good against creditors. An extensive review of English cases. 28 L. Stud. J. 8.

ISSUE OF CORPORATE STOCK FOR PROPERTY PURCHASED — A NEW PHASE. *Leonard M. Wallstein*. 15 Yale L. J. 111.

LACK OF UNIFORM CONSTRUCTION OF SIMILAR LANGUAGE IN STATE AND FEDERAL CONSTITUTIONS. *Walter H. Saunders*. Pointing out the inability of the Supreme Court to reach cases where a state court declares a state statute unconstitutional. 1 (The) Law 298.

LAW AS A CULTURE STUDY. *Edson R. Sunderland*. 4 Mich. L. Rev. 181.

LAW OF NATURALIZATION, THE. *Henry Stockbridge*. 17 Green Bag 644. See *supra*.

LIABILITY FOR THE UNAUTHORIZED TORTS OF AGENTS. *William R. Vance*. 4 Mich. L. Rev. 199. See *supra*.

MOST NOTEWORTHY CHANGES IN STATUTE LAW ON POINTS OF GENERAL INTEREST, THE. (Concluded.) *Henry St. George Tucker*. 13 Am. Law. 536.

NOTES ON THE HISTORY AND DEVELOPMENT OF THE ROMAN-DUTCH LAW. XXXIII. *J. W. W. Letting and hiring*. 22 S. African L. J. 365.

PREPARATION FOR THE BAR. *Lawrence Maxwell*. 38 Am. L. Rev. 822.

RECENT DEVELOPMENT OF THE DOCTRINE IN *TULK v. MOXHAY*, A. *Anon.* Commenting upon a case discussed in 18 HARV. L. REV. 608, and taking a view opposed to the one there advocated. 50 Sol. J. 123.

RELATION TO EACH OTHER OF DIFFERENT ADMINISTRATORS OF THE SAME DECEASED, THE. *Thaddeus D. Kenneson*. Maintaining that the fiction that an administrator continues the *persona* of the deceased is equally applicable where different administrators are appointed in several states. 6 Columbia L. Rev. 15.

REVIEW OF LEGISLATION OF YEAR 1904-1905. *Henry St. George Tucker.* 39 Am. L. Rev. 801.

RIGHT OF ALIENS UNDER AMERICAN STATUTES GIVING A CAUSE OF ACTION FOR DEATH. *Anon.* Discussing the conflict of authority as to whether the provisions of Lord Campbell's Act confer a right of action on aliens, and contending that they should. 1 (The) Law 358.

SPIRIT OF THE COMMON LAW. *Roscoe Pound.* 18 Green Bag 17.

SYSTEM OF PROBATE COURTS IN CONNECTICUT, WITH SOME SUGGESTIONS FOR ITS IMPROVEMENT, THE. *James Kingsley Blake.* 15 Yale L. J. 131.

II. BOOK REVIEWS.

STUDIES IN THE CIVIL LAW, and its Relations to the Jurisprudence of England and America, with References to the Law of our Insular Possessions. By William Wirt Howe. Second edition. Boston: Little, Brown, and Company. 1905. pp. xii, 390. 8vo.

Judge Howe begins by saying: "The American Lawyer of to-morrow should study the Civil Law for four reasons:"

(1) Because modifications of that law obtain at present in Cuba, Porto Rico, and the Philippines; in Louisiana, California, and New Mexico; in Lower Canada, Mexico, Central America, and South America. All of these are newly opened fields, as to the laws and customs in which capitalists from the older states seeking investment need advice.

(2) Because one never knows one's own system thoroughly until one places it in the parallel column and compares it line by line with another system.

(3) Because the Common Law owes large debts to Justinian, and, as he knows best the value of words who knows their Latin origin, their history, and their component parts, so he knows best the meaning and value of law who knows its foundation and is familiar with its growth.

(4) Because, by studying the old Civil Law, we lose something of our American arrogance. The discovery that not we but Gracchus first declared that a statute should contain but one object; that Paul wrestled with the subject of Contributory Negligence and evolved something very similar to the "last-clear-chance" doctrine; that the Hadley *v.* Baxendale ruling was evolved and boiled down into the terse phrases of a codal article some centuries before that case: this is striking evidence of our debt to the jurisconsults.

Judge Howe's book presents the cullings made from a broad and thoughtful reading of the history of Rome and of its laws. Beginning with Pius Aeneas, it traces the development from the individual into the family, from the family into the *gens*, and from the *gens* into the city, showing the growth of the law as co-equal with that of the population. The city was at first governed by the *Jus Civile*, a law which the original *gentes*, who at first constituted the entire free population, created to apply to themselves alone. As the city's commerce increased, and foreign merchants immigrated thither, the *Praetor Peregrinus* was appointed and the *Jus Gentium* evolved to govern them. Then, as the old families or *gentes* gradually died away and were replaced by strangers, so the *Jus Civile* gradually died away and was replaced by the *Jus Gentium*, which the author traces into the Amalfian Tables, and the Consolato del Mare, and then through Oleron, Wisby, and the Hanseatic Code into the famous Marine Ordinances of Louis XIV and the Code du Commerce of Napoleon.

A discussion of the history of the Civil Law in England is followed by an account of its development to date in France, Germany, and the Americas. Our new insular possessions are governed by the Codes of Spain, which consist, at present, of a Civil Code enacted in 1889, a Commercial Code enacted in 1886, and a Code of Procedure enacted in 1881.

Coming from history and generalities to questions of substantive law, Judge Howe deals rapidly with Persons, Property, Contracts, Successions, and Remedies, stress being laid, as it should be laid, upon Marital Rights, Contracts, and Descent and Distribution. It is to be regretted that the author, who is

peculiarly fitted for such a labor, did not, in the pursuit of this discussion, make use of parallel columns. These subjects are those regarding which the common law attorney is most likely to require information, and had this book laid down the Common Law on these subjects, point by point, and beside it placed the Civil Law on the same subject, point by point, and supplemented these comparisons by notes showing the importance of the differences, it would have rendered a very valuable service to the profession. As it is, the differences are in some cases pointed out, in others left to be discovered by the reader. Only a few of the many that are suggestive and important can be remarked upon here. A contract is called by its proper name, to wit, a conventional obligation; an offer and acceptance, both duly communicated, are essential in both systems. At Common Law a gratuitous contract must be under seal, while at Civil Law a donation *inter vivos* must be by notarial act. In England the doctrine of consideration arose gradually and silently, and continued to grow, though repudiated by Lord Mansfield; while in Louisiana, though the Code of 1808 did not consider a consideration necessary to support a parol promise, and Eustis, C. J., expressly repudiated the doctrine of consideration, it is still a healthy, hearty doctrine at present. Minors and infants are both without capacity to contract at Civil Law, but minors have the advantage over infants in that they can rid themselves of this disability in some cases by what is called emancipation. Duress of goods is expressly recognized as vitiating consent in Louisiana, a rule which does not seem to obtain at Common Law. (Anson, Contracts, 214.) Under Descent and Distribution or "Succession," attention is called to the fact that in both systems of law an intestate succession falls to the descendants, or, in default of them, to the ascendants, or collaterals, in substantial accordance with the rule laid down by Justinian. But the Civil Law limits the power of the testator by providing that a man leaving three or more children can dispose of only one-third of his estate. This provision, if enforced in the common law states, would in large measure prevent the amassing of colossal fortunes in the hands of a few by compelling their distribution at the passing away of each generation.

These differences and the differences between prescription and the statute of limitations; the law of Privileges; the conception of a partnership as an entity; the absence of distinctions between realty and personalty in Descent and Distribution; the differences in the law of Mortgages, and the radically different land tenure; the theory of immovables by destination, and the prohibition against trust estates, while they are in some cases referred to, are not collated and presented in concise form readily accessible for future use. In this respect the author has wasted an opportunity. For practical utility, therefore, the value of the book is small. It is a book of a student and not of a practitioner. Yet in that very fact lies much of its charm. The style is quiet and uninterrupted by lists of cases stabbed into the text in support of each proposition. The book is an essay breathing the calm of the library on a still night rather than a brief or a text-book exhaling the bustle of the office.

J. B. M.

CENTRALIZATION AND THE LAW. SCIENTIFIC LEGAL EDUCATION. An Illustration. With an Introduction by Melville M. Bigelow. Boston. Little, Brown and Company. 1906. pp. xvii, 296. 8vo.

This book is a mosaic; composed principally of lectures recently delivered at the Boston University Law School by Messrs. Brooks Adams, Melville M. Bigelow, Edward A. Harriman, and Henry S. Haines. By far the larger part is contributed by Mr. Adams and Professor Bigelow. Whether the reader adopts or rejects the final conclusions of the writers, he must admit that their discussions are, as Sir Henry Maine said of the Analytical Jurists, useful "for the purpose of clearing the head." They present important issues with great distinctness. Unique, radical, stimulating, — these are terms which may well be applied to large portions of this book.

The main features of the book are clearly and forcibly outlined by Professor Bigelow in the Preface and Introduction :

"These lectures turn on three words, Equality, Inequality, and Administration; the first as the dominant force in American life during the late 'classical' period of the law; the second as representing the present condition of society; the third as the supreme aim of legal and of all education intended to fit men to engage in the affairs of the day.

"... law is the expression, more or less deflected by opposition, of the dominant force in society. . . . It follows from the view that law is the resultant of actual, conflicting forces in society, that the notion of abstract, eternal principles as a governing power, with their author the external sovereign, must go. . . .

"Inequality appears in two aspects, namely, between capital and the public, and between capital and labor." While there is a "growing conception of the public as a distinct entity having rights," yet the public, as standing for equality, is at a great disadvantage in fighting the capitalist. The weapons furnished by the old legal doctrines are "powerless" "against the skilful equipment of inequality." The existing law has been largely made for us "by other men, living under conditions differing from those under which we live." The law "is handicapped in all its branches with historical survivals."

In the second aspect of inequality, presented by capital and labor, "the latter as well as the former in combinations is in effect an agency in monopoly. . . . Here is inequality against inequality."

In Herbert Paul's recent biography of Froude, it is said that the historian's besetting sin was a love of paradox. Mr. Brooks Adams may, perhaps, be accused of an occasional tendency to extravagance in statement. But that his essays are readable no one can question.

While not disputing the familiar saying that the movement hitherto has been "from *status* to contract," Mr. Adams thinks we are now witnessing "the passage from contract to servitude." Some of his views may be summarized as follows, mostly in his own words :

Society broke with its past by the introduction of steam. Within seventy-five years social conditions have changed more profoundly than they had done before since civilization emerged from barbarism. There must be a corresponding change in the law. A new civilization has arisen, based on scientific discoveries and undreamed of mechanical processes, which, besides generating the trade union, develop the monopoly. This new birth must be swathed in a new envelop of law. Excessive competition leads to monopoly. Suppose competition be forced to the end, it must result in monopoly by survival. Suppose competition be checked to protect the weak, combination to control prices must result. Two grim alternatives confront us: on the one hand, despotism, either by capitalists or trade unionists; on the other hand, the establishment of State Socialism (or at least State regulation of prices.)

Mr. Adams gives a graphic historical sketch of the decline of feudalism; the rise and decay of the merchants' guilds; and the creation of monopolies, formerly by governmental grants of exclusive privileges, and to-day by combinations of private individuals.

It is possible to gather from Mr. Adams' essays the prediction that all existing legal principles, so called, must be discarded, and an entirely new system evolved to meet the present emergencies. But the calm wisdom of Professor Bigelow rejects this theory. In his view, "No working of the dominant spirit is likely to-tear out the inner walls of the law," whatever fate may befall the exterior walls built up by logic. Pp. 200, 201.

There are passages in the essays of both Professor Bigelow and Mr. Adams which might seem to a casual reader to affirm that judges register, and bow to, the decrees of the populace. See pp. 154 and 132. In the Preface, however, Professor Bigelow expressly disclaims the notion that the courts are influenced by the dominant forces consciously or in any objectionable way. No doubt legislation and enlightened public opinion do have an influence on the minds of judges in shaping and reshaping the common law. This is candidly admitted by Lord Hobhouse in his admirable opinion in *Smart v. Smart*, L. R. (1892) App. Cas. 425. But judges who are worthy of their place play an efficient part

as brakes and cog-wheels in delaying the triumph of the latest popular fallacy; and it often happens that, during the delay so occasioned, the bubble is pricked and the danger disappears.

It must not be supposed that the effect of centralization is the only topic discussed in these pages. Professor Bigelow earnestly argues that the education of the lawyer should not be confined to the study of law *stricto sensu*. He believes, and rightly, that a man who knows nothing but law cannot, at the present day, be a successful legal practitioner. (See especially his very forcible remarks, pp. 203-206; and also Professor Harriman's lecture on "Law as an Applied Science," pp. 208-230.)

Furthermore, there are what may be called incidental nuggets of wisdom scattered up and down the pages of this book. See, for instance, Professor Bigelow's extremely valuable observations on the making of definitions (p. 163); and his warning as to the dangers of logic (p. 183). See also Mr. Adams' statement on p. 51: "Perfection in thought consists in the elimination of the immaterial"; and on p. 46 "... You can no more reason from highway precedents to railway problems than you can reason from the ox to the electric battery."

J. S.

A TREATISE ON THE LAW OF FIXTURES. By Marshall D. Ewell. Second Edition, edited and annotated by Frank Hall Childs. Chicago: Callaghan & Co. 1905. pp. cviii, 784. 8vo.

The first edition of this standard treatise was published in 1876. It might be expected, therefore, that a second edition, published in 1905, would show both a large increase in the amount of material included and a recasting of the treatment of several branches of the subject. As to the first requirement, the new edition leaves little to be desired. The number of cases cited has been more than doubled and now amounts to nearly five thousand. Furthermore, the citations cover a range seldom equalled; many references are given to decisions in Canada, Australia, and other parts of the British Empire, as well as to cases in various minor American courts, such as the lower courts of Pennsylvania and Ohio.

On the other hand, the editor's method of bringing the first edition down to date is hardly to be commended. No changes have been made in the text, other than the omission of a number of passages regarded as obsolete, the editor's additions being wholly in the form of bracketed notes. This arrangement may be justifiable in handling a text which has become in some sense a classic, though it inevitably causes inconvenience; but it cannot well be contended that the first edition of the present work, admirable as it was, had attained such a position as to make improper a revision of the text, especially at a time when the author is still living, and, as shown by the prefatory note, able to supervise the new edition. Moreover, the editor's notes are peculiarly unsatisfactory, in that they consist almost entirely of summaries of recent decisions, in the nature of short headnotes, with little or no independent discussion. The result is better than might be supposed, partly because of the good quality of the original work, and partly because of the comparatively slight changes in the principles of this branch of the law. The recent cases have been so largely devoted to the application of well-established doctrines to new states of fact that a treatment of them necessarily partakes somewhat of the character of a digest. But the arrangement is, at best, confusing, and greatly impairs the utility of the book. This is especially so in topics in the treatment of which the editor has made large additions, such as "Taxation"; here a note of more than seven closely printed pages is attached to a third of a page of text, with no sub-headings or other guides through the wilderness of citations. So, as a note to the proposition that "all fixtures, whether actually or constructively attached to the realty, pass by a conveyance or mortgage of the freehold," there are nearly thirteen pages of undiluted abstracts and citations.

The arrangement is also unfortunate because it results in leaving unchanged several parts of the text which call for revision. These are not many, to be

sure, but they are worth noting. For example, the principle is recognized in the text that the question of whether an article annexed to the realty becomes a part of the realty is a question of what has been called the "objective intention" of the person making the annexation, the actual intention being material only as bearing on the right of severance. Nevertheless, the author often loses sight of this principle, and falls into the common but inexact practice of treating the character of such an article as dependent on the intention or agreement of the parties. It is to be regretted that the editor has missed his opportunity to correct this inaccuracy. To take another illustration, the text states without qualification the harsh doctrine of *Watriss v. First Bank of Cambridge* (124 Mass. 157), as to the effect of a surrender and acceptance of a new lease on a tenant's right to remove fixtures. Surely some discussion of the contrary doctrine might be expected, other than the mere statement that "a few states have repudiated the rule stated in the text," followed by a quotation from the opinion in *Kerr v. Kingsbury* (39 Mich. 150). Yet again, the important subject of the rights of a mortgagee of fixtures as against a mortgagee of the land is split in two, some of the authorities being examined in the chapter on "Grantor and Grantee," and others in the chapter on "Registry Acts." The subject has, of course, these two aspects, but they are so interwoven that an attempt to treat them separately can only result in repetition and confusion, so that a remodeling of the whole treatment was in order.

Thus the chief feeling with which one closes the book is one of regret that the editor's painstaking efforts have not been differently directed, — that he should have devoted himself so largely to searching out cases in New Zealand and the Straits Settlements, rather than to producing a well-digested statement of the law of fixtures as it exists in the United States to-day.

H. S. D.

THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION. By Frederick N. Judson. Chicago: T. H. Flood & Co. 1905. pp. xix, 509. 8vo.

Those who are familiar with Mr. Judson's work on Taxation will welcome his new venture in the field of legal literature. He has again selected a live subject and one in which the harvest is plenty although the workers are few. Besides the present book, the treatise by Mr. Snyder, of the New York Bar, published in 1904, is the only other up-to-date work on the subject of Interstate Commerce. The main portion of the present work, some two hundred pages, is given up to a detailed discussion of the Interstate Commerce Act and the Amendment of 1903. This is by far the most important feature of the volume. The author takes up the Act, section by section, and collects under each section the appropriate decisions. This is not done by the usual and unfortunate method of merely collecting the citations in footnotes; but the precise point decided in each case is stated clearly in the text. There is not a footnote in these entire two hundred pages. In later passages other congressional acts are discussed, among them the Anti-Trust Act of 1890, the Safety Act of 1893, with its amendments of 1896 and 1903, the Expedition Act, the Accident Law of 1901, the National Arbitration Act, the National Trade Union Incorporation Act, and the Act creating the Department of Commerce and Labor. Under each of these enactments Mr. Judson collects exhaustively the illustrative decisions; those of the Interstate Commerce Commission he states at length.

The first one hundred and fifty pages of the work are devoted to a general discussion of Interstate Commerce and the conflict between federal and state control. Here is provided an admirable summary of the law in its present state; but there is lacking the theoretical presentation necessary to a complete grasp of the subject. Especially is this true of the discussion of the effect of state "Police Power" on Interstate Commerce. Though in few other subjects is it so necessary to understand the growth of the law, the treatment of this phase of the Interstate Commerce law is inadequate; and to secure a thorough understanding thereof the student will still be compelled to look to the special

works on the subject, especially to the admirable and scholarly treatise by Mr. Hastings, published in the Proceedings of the American Philosophical Society, September, 1900. Again, the discussion of the decisions under the Wilson Act is hardly complete. For example, the author fails to note the cases dealing with the effect of licensing ordinances under the Wilson Act, a phase of the subject upon which the law was in some doubt until the recent decision by the Supreme Court of the United States in the case of *Pabst Brewing Co. v. Crenshaw* (25 Sup. Ct. Rep. 552). The last-mentioned case was decided after the publication of Mr. Judson's work, but he should have noticed such decisions as *Pabst Brewing Co. v. City of Terre Haute* (98 Fed. Rep. 330). Possibly, these matters may be regarded as somewhat collateral to the main purpose of the book, and the limitations in space may be offered as an excuse for the inadequacy of treatment.

The most serious general criticism that suggests itself to the reviewer is that Mr. Judson has not sufficiently expressed his own opinion upon mooted questions, nor given a sufficient discussion of the dissenting views on certain important cases, especially those which the Supreme Court has decided by bare majorities. For example, the Northern Securities case would seem to merit more than half a page, and one would expect at least to secure references to authorities where elaborate discussions of so weighty a decision could be found. On the other hand, the author has produced a thorough and eminently practical compilation of the decisions upon the subject of Interstate Commerce. His is probably the most useful work that has appeared upon the subject. It is well edited, the arrangement is clear and concise, and the index is complete. Of interest and value is the table of decisions of the Interstate Commerce Commission on the question of reasonableness of rates, showing the cases in which the order of the Commission was complied with by the railroads, wholly or partially, and the instances in which the enforcement of the order of the Commission was compelled or refused by the federal courts.

J. M. B., JR.

THE LAW OF FIRE INSURANCE. By George A. Clement. In two Volumes. Volume II. New York: Baker, Voorhis & Company. 1905. pp. cxvii, 807. 8vo.

A notice of the first volume of this work appeared in 17 HARV. L. REV. 370. This volume, the second, purports to treat the subject of fire insurance, "taking as a basis the conditions of the standard forms or of the contract specifically declaring the agreement to be void." The statements of law are reduced to "rules," so called, so that the text takes much the form of a brief. The book is not a treatise, nor does it pretend to be. It furnishes, however, a ready means of reference to a large number of cases and to the principles governing this branch of the law of fire insurance. Especially is the work to be commended for giving under each topic the provisions of the various standard forms of policies, and pointing out wherein they are similar and wherein they differ.

The New York standard form has been made the basis of the work. As this form is in such general use, the fact does not, perhaps, lessen the value of the book in the hands of one familiar with the general principles of insurance. It does, however, greatly detract from its value as a book to be used either by students or by any persons not already well acquainted with the subject, in that, by laying stress on the terms of the standard form, it is likely to mislead such persons as to the nature of some of the fundamental doctrines underlying every contract of insurance and the reasons for such doctrines.

For instance, such persons might well be misled as to the real nature of the defense of concealment, by what is said on p. 2, where, after giving the "rule" as to concealment "as imposed by contract" by stating the language of the New York standard form on this point, the author adds in a note: "It would seem that concealment by the insured as to any material matter relating to the insurance may void the policy independent of any specific

provision therein." A similar note is added on p. 15, after the rule as to misrepresentation.

Rule 15, on p. 157, appears to contradict itself. The opening sentence states that "there is a distinction between interest and title," while the last sentence closes with the statement that "interest may be construed as synonymous with title."

In other respects the book is open to criticism. In the first place it can hardly be said to be a scholarly piece of work; the style is poor, — not infrequently incoherent and occasionally positively ungrammatical (*e. g.*, pp. 5, 7, 127, 176). The statements of law are not always clear and free from ambiguity. A sentence taken from p. 176 will serve as an example. The subject under discussion is as to what constitutes sole and unconditional ownership within the terms of an insurance policy; and as an illustration, the author says: "An owner of an estate in fee upon a condition subsequent and in possession with no condition broken, and a deed has been deposited in escrow to be delivered upon performance of the condition, is a sole and unconditional owner." Again, in the manner of citing authorities there is room for improvement. The cases cited are grouped apparently without any attempt at uniformity, either in arrangement of jurisdictions (alphabetically or otherwise), or in placing together all cases cited from one jurisdiction. Where a few cases only are cited, this matter is perhaps not serious; but where, as on pp. 42, 49, 107, 448, and elsewhere, we find solid pages of citations, the lack of arrangement becomes a defect which will cause those using the book much loss of time and annoyance. Incidentally we may remark on a lack of uniformity in citing the Massachusetts Reports. For example, *Daniels v. Hudson River Ins. Co.* is cited on pp. 3 and 15 as in 66 Mass. 416; while on p. 78 the reference is to 12 Cush. 416, which we believe is the correct form of citation. We also believe that 95 U. S. is preferable to 5 Otto (p. 135).

S. H. H.

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PRESUMPTION OF THE FOREIGN LAW.

A CONTRACT made in a foreign state and to be performed there, is, by the usual rule, governed by the law of the foreign state as distinguished from the law of the forum where suit may happen to be brought upon it. The law of the foreign state governs not alone as to the validity of the contract, its legal effect, and the construction of its terms, but also as to the sufficiency of defenses to a suit upon it. Thus, if the suit in the forum be against a surety on a note, the giving of time to the principal debtor is a defense only provided the law of the foreign state recognizes it to be so.¹ In practice, however, in the various jurisdictions of the United States, it is believed that many suits on foreign contracts are tried without either party alleging or proving in the slightest degree the foreign law which admittedly governs and is a necessary part of the plaintiff's case and the defendant's defense. Upon what principle can this neglect to prove a relevant fact in the case be justified? It is said usually that the court of the forum supplies the lack of proof by a presumption. Under what circumstances, then, does the court of the forum make a presumption as to the foreign law, and what is the presumption which it makes?

It is fundamental that courts will not, as a general rule, take judicial notice of what the foreign law is, where that becomes relevant. It is equally fundamental that, in general, courts do not presume what the foreign law is. This means no more than that, as a

¹ Howard v. Fletcher, 59 N. H. 150; Tenant v. Tenant, 110 Pa. St. 478; 3 Beale, Cases on Conflict of Laws, 544.

general rule, there is no short cut to relieving a person who has the burden of proving a certain case or defense in which the foreign law is a fact to be proved like other facts, from the usual burden of going forward in the first instance with evidence upon that point. The burden of going forward, then, is shifted to one who has not the burden of proof upon the whole case only by some especially and particularly defined rule, — that is, where it is done, it is by way of exception to a general rule and not the rule itself; or, to use a more usual form of expression, the court of the forum will make a presumption as to what the law of the foreign state is, only by way of exception to the general rule. A careful review of a very considerable number of authorities leads me to conclude that there are three possible rules for determining when the court of the forum will make a presumption as to the law of the foreign state, and what presumption if any it will make; or as I would prefer to say, there are three possible rules which indicate when the court of the forum will shift the burden of going forward with evidence as to the foreign law upon the party not having the burden of proof of the whole issue of which the foreign law is a part.

The first position is as follows: when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both; otherwise there is no presumption at all.

This rule rests upon the existence of a logical distinction between the case where the forum takes judicial notice that the foreign state has fundamentally the same system of law as the forum and that where the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law. The cases make pretty plain the way the courts recognize which of the American and European states have fundamentally the common-law system and those which have not. Where the forum, like Illinois, is composed of territory belonging to one or more of the original thirteen colonies of Great Britain, and actually settled by those who brought the common law with them, it can properly make a presumption in regard to the law of foreign states having a common origin with it.¹ It may, therefore, assume the common law to prevail in

¹ *Miller v. McIntyre*, 9 Ala. 638; *McAnally v. O'Neal*, 56 Ala. 299 (indulging the presumption with respect to Georgia); *Gluck v. Cox*, 75 Ala. 310 (indulging the presumption with respect to Mississippi); *Peet v. Hatcher*, 112 Ala. 514; *Norris v. Harris*,

England,¹ Provinces of Canada² whose jurisprudence is judicially known to be based upon the common law, and all that part of the territory of the United States east of the Mississippi River, excepting Louisiana and Florida.³ Illinois has in fact made this presumption, and may very properly go farther, following Judge Field (afterwards Associate Justice of the United States Supreme Court) in *Norris v. Harris*,⁴ and indulge a similar presumption as to the existence of the common law "in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where in fact the population of the new state upon the establishment of government was formed by emigration from the original states."⁵ As to Texas, Florida,⁶ and Louisiana⁷ it must take judicial notice that the fundamental law there is the civil law. As to Texas⁸ in particular the court

15 Cal. 226. See also *Tinkler v. Cox*, 68 Ill. 119 (Ind.); *Schilee v. Guckenheimer*, 179 Ill. 593 (Ohio).

¹ *Stokes v. Macken*, 62 Barb. 145 (N. Y.).

² *Dempster v. Stephen*, 63 Ill. App. 126. But in *Owen v. Bowle*, 15 Me. 147, the court refused to indulge the presumption that the common law of England prevailed in the Province of New Brunswick.

³ See cases in note 1, p. 402.

In Missouri it appears to be the rule that no presumption can be indulged excepting in states which prior to becoming members of the Union were subject to the laws of England: *Silver v. Kansas City, St. L. & C. R. Co.*, 21 Mo. App. 5 (denying presumption with respect to Kansas); *Witaschek v. Glass*, 46 Mo. App. 209; and *Bain v. Arnold*, 33 Mo. App. 631 (denying presumption with respect to Kansas); *Bahrydt v. Alexander*, 59 Mo. App. 188 (denying presumption with respect to Iowa); *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147 (denying presumption with respect to Kansas); *Clark v. Barnes*, 58 Mo. App. 667 (denying presumption with respect to Arkansas); *Searles v. Lum*, 81 Mo. App. 607 (indulging presumption with respect to Mississippi).

⁴ 15 Cal. 226, 252.

⁵ The Illinois cases have clearly adopted this principle: *Crouch v. Hall*, 15 Ill. 263 (Mo.); *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427 (Ia.); *Miller v. MacVeagh*, 40 Ill. App. 532 (S. D.); *Lipe v. McClevy*, 41 Ill. App. 59 (Col.).

See also *Cressey v. Tatom*, 9 Ore. 541 (indulging presumption with respect to law of state of Illinois); *Buchanan v. Hubbard*, 119 Ind. 187, 191, 21 N. E. Rep. 538 (indulging presumption with respect to Kansas).

⁶ *Norris v. Harris*, 15 Cal. 226, 253; *Equitable Bldg. v. King*, 37 So. Rep. 181 (Fla.) (no presumption as regards the law of Georgia).

⁷ *Norris v. Harris*, *supra*; *Sloan v. Torrey*, 78 Mo. 623; *Peet v. Hatcher*, 112 Ala. 514; *Sims v. Southern Express Co.*, 38 Ga. 129, 132; *Kennelbrew v. Southern Auto Co.*, 106 Ala. 377, 17 So. Rep. 545.

⁸ *Castleman v. Jeffries*, 60 Ala. 380; *Flato v. Mulhall*, 72 Mo. 522; *Norris v. Harris*, 15 Cal. 226, 253; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385.

On the same principle Texas will make no presumption that the law of a sister state, with a common law system, is a particular rule of the common law. There is a legion

will take judicial notice that it has fundamentally, not the common law system of jurisprudence, but that of the civil law. This appears from the fact as stated by Judge Field¹ that Texas "was an independent country at the time of its accession to the United States — having laws of its own, not being carved out of the ancient colonial provinces of England, like the original thirteen states, or formed by emigration into an uncultivated country from those states, but from a Mexican province by a successful revolution against the Republic of Mexico." So with regard to Mexico,² France,³ and other wholly foreign countries.⁴

If the foundations of the legal system of the forum and of the foreign jurisdiction are judicially noticed to be the same, then the court of the forum presumes that it is the same as that which the fundamental system upon which the law of the forum and of the foreign state is based, recognizes it to be. This most often occurs in the United States, where the law of the forum and of the foreign state are both noticed to be fundamentally based on the common law of England. Thus, if the English common law were noticed to be the basis of both the law of the forum and the foreign state, the rule which the forum declares or recognizes to be the rule of the common law⁵ would be presumed to be the law of the foreign jurisdiction, and that too although the legislature of the forum had abolished that rule of the common law by statute. In terms of the burden of going forward with evidence, the rule amounts to this: That under the circumstances mentioned the party desiring to show that the foreign law is different from the rule of the common law has the burden of going forward with evidence. This is the position which the Supreme Court and Appellate Courts of Illinois have unequivocally taken. Thus, where a married woman in a sister common law state, having, subsequently to the Illinois Married Women's Acts of 1861 or 1872,

of cases to this effect (67 L. R. A. 53). See, however, the recent one of *Blethen v. Bonner*, 53 S. W. Rep. 1016 (Tex.).

¹ *Norris v. Harris*, 15 Cal. 226, 253.

² *Banco de Sonora v. Bankers Mutual Casualty Co.*, 100 N. W. Rep. 532 (Ia.).

³ *In re Hall*, 61 N. Y. App. Div. 266, 70 N. Y. Supp. 406.

⁴ *Aslanian v. Dostumian*, 174 Mass. 328 (Asiatic Turkey); *Savage v. O'Neal*, 44 N. Y. 298 (Russia); *Male v. Roberts*, 3 Esp. 163 (Scotland); *Thomas v. Ketcham*, 8 Johns. (N. Y.) 190 (Jamaica).

⁵ See especially *Patillo v. Alexander*, 30 S. W. Rep. 644 (Ga.). The law of Tennessee was assumed to be the same as the State of Georgia held the common law to be, although the rule of the common law recognized by Georgia was different from the rule of the common law recognized by Tennessee.

acquired personal property which she claims as her own, brought the same to Illinois, the courts of that state will assume that the common law controls and that the personal property or chattels belong to the husband by virtue of the marriage.¹ So, where a contract for the sale of land is governed by the law of Kansas, the Illinois court will assume the validity of the contract by that law, but cannot presume that any Statute of Frauds like that in force in Illinois is in force in Kansas. The Statute of Frauds of Kansas must be alleged and proved and in the absence of that proof or the going forward with evidence to that effect, the plaintiff may have specific performance of the contract in Illinois.² So, in the case of contracts bearing rates of interest above the usual legal rate, but governed by the law of a sister common law state, the courts of Illinois assume the general common law rule in favor of the validity of contracts to be in force in the foreign state. They will not assume any foreign law of usury similar to the Illinois statute, but will require the foreign usury law to be proved specifically. Hence, in the absence of plea and proof of the foreign law there can be no defense of usury.³ In the same way the common law was presumed to be in force in Ohio, so that an option contract governed by the law of Ohio was held valid, although such contract by the statute of Illinois would be unenforcible.⁴ The posi-

¹ *Tinkler v. Cox*, 68 Ill. 119; *Van Ingen v. Brabrook*, 27 Ill. App. 401; *Miller v. MacVeagh*, 40 Ill. App. 532; *Liye v. McClevy*, 41 Ill. App. 59.

² *Miller v. Wilson*, 146 Ill. 523; *Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275. See also *Raphael v. Hartman*, 87 Ill. App. 634.

³ *Smith v. Whitaker*, 23 Ill. 367; *Dearlove v. Edwards*, 166 Ill. 619. Note the distinction taken by the Appellate Court in *Robinson v. Holmes*, 75 Ill. App. 203.

Observe also that where the plaintiff sues on a foreign contract in which no interest is provided for after maturity, courts will recognize the common law validity of the contract and the right to recover a fair rate of interest after maturity as damages. *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58; *Heiman v. Schroeder*, 74 Ill. 158; *Mo. Riv. Tel. Co. v. Nat. Bank*, 74 Ill. 217; *Downey v. O'Donnell*, 92 Ill. 559; *United Workmen et al. v. Zuhlke*, 129 Ill. 298; *Heissler v. Stose*, 131 Ill. 393; *Whitaker v. Crow*, 132 Ill. 627. But a particular rate of interest allowed by a foreign statute higher than that cannot be allowed without actual proof of the foreign law; *Morris v. Wibaux*, 159 Ill. 627, 652; *Chumasero v. Gilbert*, 24 Ill. 293.

⁴ *Schlee v. Guckenheimer*, 179 Ill. 593. See also *Shannon v. Wolf*, 173 Ill. 253, and *Ferris v. Commercial Nat. Bank*, 158 Ill. 237.

Observe also that in *Dalton v. Taliaferro*, 101 Ill. App. 592, 598, "convey and warrant" in a deed concerning Iowa Lands and governed by Iowa law did not contain a covenant of warranty because it did not by the common law, and in the absence of proof of the Iowa law the common law obtained, although contrary to the Illinois statute.

In *County of Joe Daviess v. Staples*, 108 Ill. App. 539, judgment for a physician

tion thus taken by the Illinois courts is in accordance with that sustained by the large majority of jurisdictions of the United States, namely: Colorado, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, New Hampshire, New Jersey, New York, North Carolina, Oregon, South Carolina.¹

It is obvious that the presumption or ground for shifting the burden of going forward with evidence of the foreign law indicated by the above cases rests upon a purely rational basis. It exists because, from the taking judicial notice of the existence of the same system of law in the foreign state as that which exists in the forum and the knowledge of the court of the forum of what the rules of that system are, a rational and permissible inference arises as to the law of the foreign state sufficiently strong to warrant the shifting of the burden of going forward with evidence of the foreign law on whoever would contradict this inference; or, as we more often say, the court of the forum presumes that the foreign law is the same as the rule of the fundamental system at the basis of the law of the forum and of the foreign jurisdiction. Suppose, then, the court of the forum judicially notices that the fundamental system of the law of the foreign state is not the same as that of the forum. Suppose, for instance, that the Illinois forum recognizes that Texas has fundamentally not a common law, but a civil law system of jurisprudence. What result is naturally reached? Of course, under such circumstances, there can be no presumption that the law of the foreign state is the rule of the common law.² What then? The rational ground for shifting the burden of going forward or the presumption, has failed. The court of the forum has nothing upon which to act. He who had the burden of proving a case or a defense, and who, therefore, in the ordinary course had the burden of going forward in the first instance with evidence to prove the facts necessary to sustain his case or his defense, has

suing in Illinois upon a contract for professional services made in Iowa was sustained. The defense that the physician did not prove he was licensed to practise in Iowa failed because by the common law no such license was necessary, and the common law was presumed to be the law of Iowa in the absence of proof to the contrary, although by the statute modifying the common law in force in Illinois, such license was necessary.

¹ See note in 67 L. R. A. 42-55, where the law of each state is summarized and the authorities given.

² *Norris v. Harris*, 15 Cal. 226, 253; *Flato v. Mulhall*, 72 Mo. 522; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385. See also other cases cited, *supra*, p. 403, notes 6-8, p. 404, notes 1-3.

failed to sustain that burden of going forward. He has consequently failed to sustain his burden of proof. He must suffer accordingly. His case or defense must fail wholly or in part, as the case may be. This is the position taken by the following cases:

Male v. Roberts:¹ Here the plaintiff sued in England on a contractual obligation governed by the law of Scotland. The plaintiff was non-suited because he failed to prove his case on the facts. In the course of the trial, however, it appeared that the defense relied on was infancy, and it was contended for the defendant that the law of Scotland should not be presumed to be different from that of England so far as the defense of infancy is concerned. Lord Eldon, however, ruled that whether infancy was a defense depended upon the law of Scotland, and that in the absence of proof of that law as a fact the defense would fail. The law of Scotland could not be presumed to be the same as the law of England.

Thompson v. Ketcham:² Contract sued upon in New York was governed by the law of Jamaica. The plea was the general issue. Under it the defense of infancy was attempted to be maintained. It failed because the law of Jamaica respecting the defense of infancy had not been proved, and the burden of going forward with evidence in regard to the law of Jamaica was upon the defendant who had the affirmative upon the whole defense of infancy. Chief Justice Kent said: "The next question is, which party was bound to prove the law of Jamaica. The court cannot know, *ex officio*, what are the rights and disabilities of infants, or when infancy ceases, by the provincial law of Jamaica. These questions depend much upon municipal regulations; and what the foreign law is, must be proved, as a matter of fact. This was so ruled by Lord Eldon in *Male v. Roberts*.³ The defendant was bound to make out a valid defense, and it, therefore, lay with him to show that his plea of infancy was good by the law of Jamaica. The court is not to know that fact, without proof; and *the good sense and logic of pleading show, that it is the duty of the party who interposes a defense to a contract, otherwise binding, to prove everything requisite to the validity of the defense*. It was enough for the plaintiff to rely upon his demand, until it had been legally met by the plea. If the defendant had specially pleaded infancy, he ought to have accompanied it with an averment, that by the law of Jamaica he was an infant, and the contract not binding upon him. *As the defendant did not prove what the law of Jamaica was on the subject, he did not make out his defense, and the plaintiff is entitled to judgment.*"

Leach v. Pillsbury:⁴ A son died domiciled in Louisiana, leaving \$1,000 debt due him. This amount was sent by the debtor to New Hampshire to

¹ 3 Esp. 163 (1800).

³ 3 Esp. 163.

² 8 Johns. (N. Y.) 190 (1811).

⁴ 15 N. H. 137 (1844).

the deceased's brother, who is called the trustee. By the New Hampshire law the deceased's father was entitled as one of the next of kin to part of his estate. A creditor of the father attached in New Hampshire the money in the hands of the trustee. He failed to maintain the attachment, and the trustee was discharged because the devolution of the property was governed by the laws of Louisiana and no proof was made on the part of the creditor that by that law the father had anything. The burden of proof of the whole case was on the creditor of the father to prove that the father was entitled, and the court held that the burden of going forward with evidence was on him also.¹

Aslanian v. Dostumian:² Action of contract to recover the equivalent of money paid by the plaintiff to the defendants for a draft in favor of a third person payable at Harpoot in Turkey in Asia. The plaintiff relied upon a contract to re-pay the same if the draft was not paid by the drawee. One line of defense was that the defendants' contract was to pay provided the drawees did not pay and provided also all steps were taken to charge the drawers. The draft was governed by the law of Asiatic Turkey. In support of this line of defense, therefore, the fact became material whether the law of Asiatic Turkey, like the law of Massachusetts, required protest of drafts in case the drawees refused to pay in order to hold the drawers. There was no evidence in regard to the law of Asiatic Turkey on this point. It was assumed that the trial judge had in substance charged that the jury "had no right to presume that the law of Harpoot was similar to ours." Exceptions to this charge were overruled. Holmes, C. J., indicated that the law merchant in its widest interpretation was merely a vaguely defined portion "of the law of European countries, having the Roman and the Frankish law for its parents," and that "it is not to be presumed that either the Roman or Frankish law shaped the native law of Turkey. Still less is it to be presumed that Massachusetts modes of dealing with details prevail there when they notoriously vary even in European countries." Finally the learned judge concludes as follows: "If, as would seem from some of the text-books and encyclopædias, the European law of negotiable paper is known in Turkey, it is by recent legislative adoption or imitation of the French Code de Commerce, and *the fact ought to be proved by the party who wishes to profit by it*. Whether protest is necessary upon such an instrument as the draft in this case, and even whether an acceptance of it would be recognized as valid under the supposed Turkish Code, is to be settled not by presumption, *but by proof*."

In re Hall:³ The question was whether a marriage had been consummated in France between two persons not citizens of or domiciled in France

¹ See also *McDonald v. Myles*, 12 Smedes & M. 279 (Miss.).

² 174 Mass. 328 (1899).

³ 61 N. Y. App. Div. 266, 273 (1901).

at the time. There was evidence of the law of France relating to marriage, and the ceremony in question did not comply with it. It was contended, however, that the French law proved did not apply to foreigners temporarily in France, and that hence there was no proof of the law of France, and hence the law of New York state must be applied under which a good common law marriage was shown. This position the court refused to take. The court said: "Assuming, then, for the [sake of] argument, that the formalities required by the laws of France do not apply to foreigners temporarily in France, there is no proof that the common law is there applicable so as to render valid a common-law marriage. In fact the court will take judicial notice that the common law is not and never was in force in France." Hence the validity of the marriage was held not to be established.

Observe, however, that there is a qualification of this doctrine, so natural and so frequently taken for granted that its existence is almost imperceptible. Some essentially fundamental and rational principles of law, which from their nature may be assumed to exist in the system of law of every civilized country, may be relied upon without proof — that is, the burden of going forward with evidence of the foreign law is upon the person who relies upon the foreign law being in conflict with such essentially fundamental and rational principles of conduct. For instance, we may say that the court of the forum will not require in the first instance proof that the promises which the common law system recognizes as creating a contract make a valid contract under the foreign law, or that payment is a good defense, or that there is an action for injury to the person caused by negligence. Thus, in *Thompson v. Ketcham*,¹ *supra*, Chief Justice Kent, while holding that the defense of infancy failed because the foreign law allowing such a defense was not proved, allowed the plaintiff to recover, although the general issue was pleaded and the plaintiff gave no proof that under the foreign law the contract declared upon was valid.²

It is believed, however, that a presumption or shifting of the burden of going forward with evidence based upon this ground does not carry very far. For instance, while it might be recognized that all civilized nations have some rule as to the disability of infants, there is a direct denial that the defense of infancy, as

¹ 8 Johns. (N. Y.) 190.

² See also *Mackey v. Mex. Cen. R. R.*, 78 N. Y. Supp. 966, where the plaintiff in a suit for personal injuries caused by the defendant's negligence was allowed to indulge in the "presumption that the right to compensation for such injuries is recognized by the laws of all countries." The Mexican law here governed.

formulated by the common law, is so universally adopted in foreign countries that it would be assumed to exist in a foreign country not having a common law system of jurisprudence. In *Male v. Roberts*¹ Lord Eldon denied its existence in Scotland, while in *Thompson v. Ketcham*² Chief Justice Kent refused to assume its existence in Jamaica. The rule that the surety is discharged by the giving of time to the principal debtor is, it is submitted, very clearly not of so fundamental and rational a nature and so inherent a part of the system of jurisprudence of every civilized country, that the court of the forum will shift the burden of going forward with proof of the foreign law to the party wishing to prove that such rule does not exist. The rule which discharges the surety by the giving of time to the principal debtor is in fact more unusual and less rational from the point of view of systems of jurisprudence in general, than the rule which gives infants a defense to suits on their contracts according to the common law rule. The very fact that the surety is discharged by any the least extension of time, even though the surety is not in the least damaged by it, has been pointed out as an illogical and irrational extreme. It is this character of the rule which makes it impossible for a court to infer that, like a defense of payment, it is part of the law of every civilized country.

The second position is that the law of the forum (even though it be statutory) is always applicable in the absence of proof of the foreign law.

In the application of this rule it is entirely unnecessary to make the slightest distinction between whether the foreign state is one which has fundamentally the same system of law as the forum or not. The rule is a definite one in regard to all cases where the foreign law is involved and has not been proved, and where the forum has any law on the subject. This position seems to have been definitely and unequivocally taken in Texas,³ Louisi-

¹ 3 Esp. 163.

² 8 Johns (N. Y.) 190.

³ Observe the following cases where the fundamental system of the foreign law was the same as Texas, and where Texas applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of Texas and the foreign state: *Burgess v. Western U. T. Co.*, 46 S. W. Rep. 794 (Tex.) (Texas statute applies in the absence of proof of the Louisiana Law which governed); *Pauska v. Daus*, 31 Tex. 67 (statute law of Texas in the absence of proof of Mexican law will govern, Mexico having the same law fundamentally as Texas—that is, the civil law; *Mexican Cen. R. R. Co. v. Marshall*, 91 Fed. Rep. 933; *Mexican Cen. R. R. Co. v. Glover*, 107 Fed. Rep. 356). On the other hand, there is a great mass of cases where

ana,¹ California,² and Iowa.³ Sometimes the above rule is stated directly in the form indicated. Sometimes it is stated as a presumption that the foreign law is the same as that of the forum. Put in the terms of going forward with evidence, the rule amounts to this: That when the existence of the foreign law becomes important, the burden of going forward with evidence of that fact is not necessarily upon him who has the burden of proof of the facts in respect to which the foreign law is to be invoked, but that it is on whichever party wishes to show that the foreign law differs from the law of the forum, whatever that may be — whether statutory or otherwise. In many jurisdictions the rule has thus far been applied only where the foreign state, the law of which is in question, is one of the states of the United States which the court of the forum might judicially notice has the same system of law as the forum,⁴—

the law of one of the United States having a fundamental or common law system governs, and where the Texas court refused to make any presumption as to what the law of the foreign state was, and applied the law of the forum in the absence of actual proof of the foreign law: *Blethen v. Bonner*, 53 S. W. Rep. 1016 (Tex.). Also 67 L. R. A. 53 for more Texas cases.

¹ Observe the following cases where the fundamental system of the foreign law was the same as Louisiana, and where Louisiana applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of Louisiana and the foreign state: *Kuenzi v. Elvers*, 14 La. Ann. 392 (Brazil law governed, Louisiana statute prevailed); *Bonneau v. Poydras*, 2 Rob. 1 (La.); *Atkinson v. Atkinson*, 15 La. Ann. 491. On the other hand, there is a great mass of cases where the law of one of the United States having a fundamental or common law system governs, and where the Louisiana court refused to make any presumption as to what the law of the foreign state was, and applied the law of the forum in the absence of actual proof of the foreign law: 67 L. R. A. 47.

² Observe the cases where the fundamental system of the foreign law was the same as that of California, and where California applied its own statutory law as distinguished from the rule of the fundamental system of law common to both the law of California and the foreign state. A large number of these cases will be found collected in 67 L. R. A. 43. On the other hand, where the fundamental systems of law in California and the foreign state were different, the California court refused to make any presumption as to what the law of the foreign state was, and in the absence of actual proof of the foreign law, applied the law of the forum: *Cavallaro v. Texas & P. Ry.*, 110 Cal. 348; *Norris v. Harris*, 15 Cal. 226; *Loaiza v. Superior Court*, 85 Cal. 11.

³ The same situation is to be found in Iowa. Cases collected in 67 L. R. A. 46. See also *Barringer v. Ryder*, 119 Ia. 121; *Banco de Sonora v. Bankers Mutual Casualty Co*, 100 N. W. Rep. 532 (Ia.).

⁴ *Kansas: Mutual Home & Savings Ass'n v. Worz*, 67 Kan. 506. See also 67 L. R. A. 46.

Nebraska: Scroggin v. McClelland, 37 Neb. 644; *Fisher v. Donovan*, 57 Neb. 361; *Peoples Building Loan & Savings Ass'n v. Backus*, 2 Herdman (Neb.), 463. See also 67 L. R. A. 50.

i. e., the common law. But if such is the rule under these circumstances, *a fortiori* it may properly enough be the same when the foreign state is one which is recognized as having a wholly different system of law from that of the forum.¹ Perhaps cases in some jurisdictions will be found where the fundamental system of law in the foreign state was recognized to be different from that of the forum, but where in the absence of proof of the foreign law it was held that the *lex fori* was taken as a guide.² Here also we should, in the absence of anything to the contrary, naturally expect the same results even where the foreign state is one which may be recognized as having the same fundamental system of law with the forum.

This second view seems not to rest upon any particularly rational inference from the facts of which the court takes judicial notice. There is certainly nothing to warrant the court in saying that there is any probability that the law of a sister common law state is like the statutory law of the forum. How much less, then, is there any rational ground for supposing that the law of a foreign state, like Mexico or Chili, is like the statutory law of the forum of one of the states of the United States having a common law system of jurisprudence. The second view seems to rest upon the necessity of having a general rule so simple and unqualified that it may always be known who has the burden of going forward with the proof of the foreign law. From the point of certainty it may be admitted that it is a good rule. It is submitted, however, that it throws an unjust burden upon the one who has not naturally the burden of going forward with evidence. Thus, suppose the law of Chili governed in an action in Illinois against a surety, and the defendant claims a discharge because of the giving of time to the principal debtor. According to the second view, although the burden of proof of the whole of the defense of the giving of time is

North Dakota: 67 L. R. A. 52.

Pennsylvania: *Peter Adams Paper Co. v. Cassard*, 206 Pa. 179; *Linton v. Moorhead*, 209 Pa. 646. See also 67 L. R. A. 52.

South Dakota: 67 L. R. A. 53.

Tennessee: 67 L. R. A. 53.

Wisconsin: *Second National Bank v. Smith*, 118 Wis. 18. See also 67 L. R. A. 55.

Canada: 67 L. R. A. 55.

¹ Of course it is perfectly possible that a court might take the position that there was no presumption at all, as under the first view.

² *Equitable Building & Loan Ass'n v. King*, 37 So. Rep. 181 (Fla.); *Wilhite v. Skelton*, 82 S. W. Rep. 932 (Ind. Ter.).

upon the defendant, yet the plaintiff must go to the expense and trouble of going forward in the first instance with evidence tending to prove that by the law of Chili there is no such defense, when the probabilities are all in favor of the fact that that position is the correct one. The defendant who naturally has the burden of going forward with the proof of the foreign law as part of his defense can rest without any expense or trouble, and if the plaintiff fails to produce evidence as to the law of Chili proving a negative, the defendant must prevail.

The third possible position is a combination of the first and second. It is like the first when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum. It is like the second when the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law from that of the forum. Thus, in Missouri, Alabama, Arkansas, and New York, it seems clearly to have been held that if the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both.¹ There are, on the other hand, in all of the above jurisdictions cases² which might seem to the casual observer to hold that if the court of the forum takes judicial notice that the law of the foreign state is not based upon the same fundamental system of law as that of the forum, the law of the forum, if there be any, and whatever it may be, whether statutory or otherwise, will always, in the absence of proof of the foreign law, be applied.

There are two good reasons why a court should hesitate before adopting this third position. It is unsound upon principle, and the jurisdictions which at first might seem to support it do so in such an uncertain manner or under such special and peculiar circumstances that it is difficult to regard them as coming out wholeheartedly for any such view.

In Missouri, perhaps more clearly than in any other jurisdiction,

¹ See cases collected by states in 67 L. R. A. 42, 43, 49, 50, 51.

² *Flato v. Mulhall*, 72 Mo. 522; *Sloan v. Torrey*, 78 Mo. 623; *Peet v. Hatcher*, 112 Ala. 514; *Kennelbrew v. So. Auto. Co.*, 106 Ala. 377; *Brown v. Wright*, 58 Ark. 20; *Garner v. Wright*, 52 Ark. 385; *Bradley v. Mutual Benefit Ass'n*, 3 Lans. (N. Y.) 341; *Savage v. O'Neil*, 44 N. Y. 298; *Hynes v. McDermott*, 82 N. Y. 41.

this third position is taken.¹ Nevertheless, we find that Missouri has a peculiar rule that it will only notice that other states which comprise territory originally under the jurisdiction of Great Britain had the common law system and will only presume as to them that the common law is there in force. That leaves Missouri without any presumption at all concerning the law in all of the states west of the Mississippi River.² In this respect Missouri is unique among all the states of the Union. Doubtless this curious turn in the rulings of the Missouri court accounts for the illogical position that if the foreign law be not presumed to be the common law, it is presumed to be the same as the law of the forum, even though the law of the forum be a peculiar statutory enactment. In short, one curiosity in the law of Missouri is equalized by another.

The most recent case in Alabama³ giving countenance to the rule that the law of the forum governs when the law of the non-common law state or foreign country is involved, is a self-confessed *dictum*. All the other cases in Alabama, Arkansas, and New York which seem to support the proposition that the law of the forum governs when the law of the non-common law state or country is involved are, upon careful analysis, explainable without the necessity of adhering to any such rule. The result, in one case at least, is clearly explainable upon the ground that the party who had the burden of proof upon the whole case or defense, and consequently in the ordinary course had the burden of going forward with evidence of the foreign law, did not sustain that burden, and so failed. This case is, therefore, sound upon the application of the first view:

Brown v. Wright:⁴ Creditors attempted to subject land standing in the wife's name to the debt of her husband. The plaintiffs sought to prove that the land was purchased with the husband's money and was equitably his. It appeared that the land was purchased with the wife's money. The

¹ *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Anneno v. Chicago, R. I. & P. Co.*, 105 Mo. App. 540, hold that where the foreign state is a sister common law state of the forum, east of the Mississippi River, the common law rule will be presumed to be in force, even though by a statute of Missouri the common law in Missouri has been changed. See also many more cases cited in 67 L. R. A. 50. In *Flato v. Mulhall*, 72 Mo. 522, on the other hand, the law of Texas governed, and the court refused to make any presumption as to what the law of Texas was, because it had a system of law fundamentally different from that of the forum. The Missouri court, however, under those circumstances undertook to apply the statutory rule of Missouri in regard to the validity of the parol acceptance of the draft sued on. See also *Sloan v. Torrey*, 78 Mo. 623.

² *Ante*, p. 403, note 3.

³ *Peet v. Hatcher*, 112 Ala. 514.

⁴ 58 Ark. 20.

plaintiffs, as a last resort, claimed that, by the law of Texas which governed the transaction, the money used by the wife belonged to her husband. This failed because the court of the forum would not presume the law of Texas was the same as the common law. The court, therefore, properly indulged in no presumption at all, and the plaintiff did not sustain the burden of proof.

In other cases the results are explainable consistently with the first view on the ground that the court of the forum is only presuming the existence in a foreign state of a general principle of law of such universal application that no civilized system of jurisprudence can be thought to be without it:

Bradley v. Mutual Benefit Ass'n:¹ Here the burden of proof was on the defendant insurance company to show that the insured was killed while doing an act against the law, for instance, committing an assault upon the person and property of another. The evidence of the act was clear, but no proof was made that the act was unlawful according to the law of Louisiana which governed. The court, however, threw the burden of going forward with evidence that the acts proved were not unlawful by the law of Louisiana upon the plaintiff, and the plaintiff failed. This was a sound result, because the court could fairly assume that by the law of all civilized countries the forcible taking of property from another was unlawful.²

Garner v. Wright:³ The plaintiff asserted title under a chattel mortgage governed by the law of Indian Territory. It was held that no presumption could be indulged that the law of Indian Territory was similar to the common law. The court, however, did sustain the plaintiff's right of property by virtue of the mortgage and the taking of possession by him before any other lien attached. This can go upon the ground that every civilized system of jurisprudence recognizes the general principle of the right to transfer personal property. The court practically takes this view in terms.

Savage v. O'Neil:⁴ Trespass by the plaintiff against the defendant for taking her chattels upon execution against her husband. The husband transferred the goods to the wife to pay a debt he owed her for money loaned him by her. The money was loaned to the husband in New York

¹ 3 Lans. (N. Y.) 341.

² It is submitted that the same explanations should apply to *Kennelbrew v. So. Auto. Co.*, 106 Ala. 377, where the court of the forum threw the burden of going forward, with the law of Louisiana that no implied warranty existed upon the sale of a chattel for a specific purpose, upon the defendant. Here the court of the forum was only assuming that in Louisiana the rational principles of construing contracts recognized in all systems of law was in force.

Hynes v. McDermott, 82 N. Y. 41, must, it is submitted, be supported on the same ground.

³ 52 Ark. 385.

⁴ 44 N. Y. 298.

state. A verdict for the plaintiff was sustained assuming the money loaned the husband came to the wife while she and her husband were domiciled in Russia, because the law of Russia was not proved by the defendant. In other words, the court of the forum put the burden of going forward with proof of the law of Russia upon the defendant, because he was attempting to upset a natural right of property or ownership which might be presumed to exist under all systems of law.

This third view is obviously a most illogical development. You start out to recognize that one party to the suit has the burden of proof of his case or defense; that where the fundamental systems of law in the forum and in the foreign state are the same, he is assisted in sustaining that general burden of proof by placing the burden of going forward with evidence upon whosoever wishes to prove the law different from the rule of the system of law common to both the forum and the foreign jurisdiction, *i. e.*, the common law in the usual case. This rests upon a fairly natural assumption, in the large majority of cases, that the common law rule is in force in the foreign state. When, therefore, because the fundamental system of the law of the forum and that of the foreign state are wholly different, there is no longer any rational ground for shifting the burden of going forward. The logical result, therefore, should be that the burden of going forward is upon him who had the general burden of proof of the whole case. Instead, however, of adopting this position, the third view makes a perfectly irrational and arbitrary ground for shifting the burden of going forward by declaring that it shall be on whoever wishes to show that the law of the foreign jurisdiction is different from that of the forum, whatever the law of the forum may be and no matter whether it be the statute law or otherwise.

Finally, the third view has all the hardship and injustice of the second view without any of the advantage which arises from the simplicity and ease in applying the second view. By the third view you still have to make a distinction between foreign states which have a system fundamentally the same as the forum and those which have not. In the latter case the party who has not the burden of proof on the whole case is put to the expense and hardship of sending out to a distant foreign country to negative the existence of a rule of law in force in the forum perhaps by special statute and scarcely by any possibility existing in the foreign state.

In conclusion, then, upon the entire subject: The third posi-

tion is one the existence of which may fairly be doubted, and which, if it does exist, is an irrational and inconsistent development, heaping an unjust burden upon one who ordinarily does not have to go forward with proof in the first instance. The second is extreme but consistent, and has some advantages of certainty in its application. Its fault is that it also, without any adequate ground, places a burden of going forward with evidence upon the party who ordinarily does not have to do so.

The first position, on the contrary, presents a rational and logical development of the law. It does more accurate justice between the parties by leaving the natural burden of going forward with evidence where it belongs unless there is a good reason for changing it. It has also, it is submitted, the support of such eminent judges as Lord Eldon, Chancellor Kent, and, more recently, Mr. Justice Holmes.

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LIABILITY IN THE ADMIRALTY FOR INJURIES TO SEAMEN.

CONSIDERING the antiquity of the maritime law and the care which the courts of admiralty have always exercised to safeguard the interests of seamen, it might be expected that the rights of mariners before the law would now be clearly established in all particulars. But upon undertaking to investigate the precise nature and extent of the liability of vessel and owners for personal injuries received by seamen, one discovers many unsettled questions, and the task of ascertaining the recognized rights of seamen for such injuries is by no means free from difficulty. An attempt to analyze the law upon the subject ought, therefore, to be of some benefit.

A seaman, in his capacity as such, may receive injury in a number of ways.

I. He may be injured in the service of the ship by accident, through no fault of owners, master, or crew.

II. He may be injured through the negligence of another member of the ship's company.

III. He may be injured through the breaking of the rigging, or of some appliance of the ship, due to its defective condition.

IV. His health may be injured, either temporarily or permanently, through lack of proper provisions and medicines in the ship's equipment, or because of the master's failure to furnish him with the same from the supply on board.

V. An original injury to a seaman may be aggravated or made permanent by the failure of the owners or the officers of the ship properly to care for or treat his hurt.

VI. He may be injured by a physical act of violence committed upon him (*a*) by the master, (*b*) by one of the subordinate officers of the ship or, (*c*) by another seaman.

I.

The legal rights of seamen injured by accident during their employment (without the fault of any other person) reveal the marked difference in the status of mariners as compared with

workingmen on land. For whereas an employee ashore in such case would have no claim against his employer, either at law or in equity, and would be obliged to bear his loss, the seaman is entitled to the expenses of his maintenance and cure, to his wages as if he had served out the voyage, and to his passage back to the port of shipment, or (if the ship has been obliged to leave him in a foreign port) to the cost of his passage back — even if the seaman himself is not free from blame. This is an ancient doctrine of the admiralty found in whole or in part in the maritime codes, and has recently been stated by the Supreme Court of the United States,¹ as follows:

“That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.”

While the doctrine has always been recognized in this country, a conflict has nevertheless existed upon the question as to just how long the right of the seaman thus to be cured at the expense of the ship continues. Some courts, following Mr. Justice Story, have held that the liability of the ship and her owners lasts until the seaman's cure is completed, “at least so far as the ordinary medical means extend.”² In other quarters this ruling has been questioned upon the ground that the liability terminates with the seaman's contract,³ and there has been a decided hesitancy, to say the least, to extend the obligation of ship and owners beyond the end of the voyage shipped for, in the absence of neglect of the seaman by the officers after his injury.⁴ While there has not been

¹ *The Osceola*, 189 U. S. 158, at 175.

² *Reed v. Canfield*, 1 Sumn. (U. S. C. C.) 195, Story, J. at 202-203; *The Lizzie Frank*, 31 Fed. Rep. 477; *Whitney v. Olsen*, 108 Fed. Rep. 292, at 297; and *cf. The Troy*, 121 Fed. Rep. 901, at 905.

³ *Nevitt v. Clarke, Olc. Adm.* (U. S. Dist. Ct.) 316, per Betts, J.; *The J. F. Card*, 43 Fed. Rep. 92; and *cf. The Tammerlane*, 47 Fed. Rep. 822. In the *J. F. Card*, *supra*, Mr. Justice Brown, then district judge for the Eastern District of Michigan, speaking of sailors shipping on the Great Lakes, said (p. 95): “To say that the obligation of this ship extends to the cure of every man of its crew who happens to be taken sick or receives an injury while upon the vessel, no matter how long the disability may continue, would be imposing a burden upon vessel owners far beyond that contemplated by the law, or required in the interests of humanity. The court will take judicial notice of the fact that maritime hospitals are established on the principal lake ports for the nursing and cure of sailors, which are supported by deductions from their wages.”

⁴ See *The Atlantic*, Abb. Adm. 451; *The Ben Flint*, 1 Biss. (U. S. C. C.) 562; *The City of Alexandria*, 17 Fed. Rep. 390. In *Raymond v. The Ella S. Thayer*, 40 Fed. Rep. 902, the District Court for the Northern District of California took a middle

complete uniformity as to the amount of wages to which the seaman is entitled, no difficulty is presented when the injury is purely accidental.¹ And he is undoubtedly entitled to a return passage, or its cost, no matter how the injury was caused, if himself guilty of no misconduct.²

Neither of the disputed questions is definitely settled by the first proposition of Mr. Justice Brown in *The Osceola*, but no disapproval of Story's view is expressed,³ and so far as the wording of the proposition is concerned, it can be interpreted to include maintenance and cure so long as there is reasonable necessity for charging the ship with the expense of the same.⁴

II.

The liability of vessel and owners for injuries happening to a seaman through negligence is also subject to the doctrine first stated, to wit; that the seaman is entitled as a matter of right to

ground in stating that the seaman was "to receive at the vessel's expense, the ordinary medical assistance and treatment in cases of injury or acute disease *for a reasonable time.*"

¹ The diversity upon the subject of wages is the result of the distinction made in cases involving negligence or misconduct upon the part of the ship's officers. The general rule of law is that the injured seaman is entitled to the wages of the voyage and no more, and this regardless of the cause of the injury, whether the result of an accident or of the negligence of another member of the ship's company. But in some of the southern districts the courts, following the lead of Judge Woods (afterwards an associate justice of the Supreme Court), have allowed wages for a further period when the officers have been found to be in fault. Thus *cf. Longstreet v. The R. R. Springer*, 4 Fed. Rep. 671; *The City of Alexandria*, 17 Fed. Rep. 390; *The Gov. Ames*, 55 Fed. Rep. 327; *Olsen v. Whitney*, 109 Fed. Rep. 80; allowing wages to the end of the voyage, with *Myers v. Hopkins*, 1 Woods (U. S.) 170, "wages until the seaman is restored"; *Brown v. The D. S. Cage*, 1 Woods (U. S.) 401, "wages during his recovery"; *The Centennial*, 10 Fed. Rep. 397, "full wages until recovered"; *The Natchez*, 73 Fed. Rep. 267, at 270, "full wages." The term "full wages" is that employed in Art. VII of the Laws of Oleron, referring to a seaman incapacitated by sickness, and has been interpreted to mean the wages which the mariner would have received had he served out the voyage. See *Walton v. The Ship Neptune*, 1 Pet. Adm. (U. S. Dist. Ct.) 142, at 145; *Sims v. Jackson*, 1 Wash. 414; and *cf. Laws of the Hanse Towns*, Art. XLV.

² *The Atlantic*, Abb. Adm. 451, at 481; *Brunent v. Taber*, 1 Sprague (U. S. Dist. Ct.) 243; *Callon v. Williams*, 2 Low. 1; *The Centennial*, 10 Fed. Rep. 397; *The Natchez*, 73 Fed. Rep. 267; *cf. Willendson v. The Forsoket*, 1 Pet. Adm. (U. S. Dist. Ct.) 197, at 198, for the general proposition; *Harvey v. Smith*, 35 Fed. Rep. 367, a decision under the British Merchant Shipping Act; and see as to the modern French Code, *The Osceola*, 189 U. S. 158, at 169.

³ *cf. McCarron v. Dominion Ry. Co.*, 134 Fed. Rep. 762.

⁴ See *The Kenilworth*, 137 Fed. Rep. 1003; s. c. 139 Fed. Rep. 59. In *The Atlantic*, Abb. Adm. 451, Judge Betts, although holding the obligation of the ship to the

the expenses of his maintenance and cure and to the other perquisites of a disabled mariner. And this is the limit of their liability if the negligence were committed in the ordinary course of the navigation and employment of the ship. The seaman is not entitled to damages at the maritime law for injuries so received. This, again, is an ancient precept, in effect but a reiteration of the first in a different form, and is expressed by the court in *The Osceola* in the following language:¹

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The precise scope of this, the fourth proposition of Mr. Justice Brown, has not been appreciated by the lower courts, some judges seeming to think, as will shortly appear, that a change in the law has been made. Indeed, the force of the doctrine thus restated by the Supreme Court has never been fully recognized by federal magistrates, with the result that in almost all cases involving negligence on board ship, and especially in cases involving negligence on the part of some member of the ship's company other than the master, recovery has been denied on the ground that the injured and negligent parties were *fellow servants*. And what is more unfortunate, a seeming approval of this method of deciding the issue is contained in *The Osceola*. That case (decided March 2, 1903) was a cause *in rem* against a steamer, brought by a seaman seeking to recover damages for personal injuries sustained by him through the negligence of the master, in ordering him to get ready a freight gangway for unloading while the ship was yet at

mariner to be limited in duration to that of the latter to the ship, adds at p. 480: "This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his case has been improperly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty toward disabled mariners, even after her contracts are terminated, upon the ground of failure to perform towards them the obligation in the shipping contract." In England, by a recent decision, the ship-owners' liability for medical and surgical attendance is said to be at an end after the seaman "has been brought back to a home port." *Anderson v. Rayner* (1903), 1 K. B. 589.

¹ 189 U. S. 158, at 175.

sea and proceeding with good speed against a head wind. In his opinion, Mr. Justice Brown reviews a number of authorities, English and American, relating to the liability of ship and owners for injuries to seamen, and then proceeds to state four propositions with respect to which, as a result of the review, the court were of the opinion that the law might be considered to be settled. Two of the propositions have already been quoted, and they were sufficient to dispose of the case. But, in addition, the court laid down two other propositions which are *dicta*:

"2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211.

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

Proposition 3 states the fellow servant doctrine as the same has been applied by the federal courts. This application of a common law rule to the adjudication of marine causes is criticised by Frederic Cunningham, Esquire, in an article which appeared in this REVIEW, upon the ground that it is not necessary because "the doctrine of *respondeat superior* when properly applied does not have its full force in the admiralty."¹ Relying upon the fact that the third "settled" proposition of the court in *The Osceola* was not essential to the decision of the case, Mr. Cunningham expresses the hope that when the fellow servant question is fairly presented to the Supreme Court it will exclude the doctrine from the admiralty jurisprudence as it did the common law rule of contributory negligence in *The Max Morris*.² We heartily join in this hope.

III.

Liability for injuries due to defective appliances, in this country, is governed by the second proposition of Mr. Justice Brown, quoted above. A *dictum* so far as the case presented was con-

¹ "The Extension of the Fellow Servant Doctrine to the Admiralty," 18 HARV. L. REV. 294, February, 1905.

² 137 U. S. 1.

cerned, for it was not contended that there was any defect in the appliances used, the proposition yet embodies the principle of numerous decisions in the federal courts, and is characterized by the Supreme Court as a "wholesome" doctrine which they are "not disposed to disturb."¹ In England the subject is covered by statute, the Merchants' Shipping Act² importing into every contract of service between the owner of a ship and the seaman on board an implied obligation:

"That the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same."

This statutory provision has been strictly construed by the English courts. In *Hedley v. Pinkney & Sons S. S. Co.*,³ a case where a vessel was sent to sea with stanchions and rails on board but not in place, and a sailor was drowned in a storm because of the failure of the master to set up the appliances, it was held that the representatives of the deceased had no claim for damages: first, because the master and seamen were fellow servants, and, secondly, because notwithstanding it was unsafe for the vessel to leave port without setting up the stanchions and rails, the ship was not unseaworthy within the meaning of the law; the House of Lords being of opinion that the words of the act, to "keep her in a seaworthy condition for the voyage during the same," did not mean to impose liability for a "neglect properly to use the appliances on board a ship well equipped and furnished."⁴

The American cases, on the other hand, have not restricted the ground of the seaman's right to recover to the owners' negligence in furnishing the ship at commencement of the voyage, but have held ship and owners to an indemnity for injuries resulting from the failure of the latter's agents, the officers of the ship, to keep the ship and her appliances in condition even when she was not under their personal supervision.⁵ This is the explanation

¹ *The Osceola*, 189 U. S. 158, at 175.

² 39 & 40 Vict. c. 80, s. 5 (1876); 57 & 58 Vict. c. 60, s. 458 (1894).

³ (1894) A. C. 222.

⁴ Compare the earlier cases of *Couch v. Steel*, 3 E. & B. 402 (1854); *Searle v. Lindsay*, 11 C. B. (N. S.) 429 (1861).

⁵ The ruling in *Couch v. Steel* that there is no implied warranty of seaworthiness in a contract of shipment is not followed in this country. 2 *Parsons, Shipp. & Adm.*, 1869 ed., 78, note; *The Noddleburn*, 28 Fed. Rep. 855, at 857.

of the decision of Mr. Justice Gray in *The A. Heaton*,¹ where a seaman was injured through the breaking of a defective gasket, as to the condition of which the master was seasonably warned, and likewise of that in *The Noddleburn*,² where the master of a British vessel knowingly allowed a crane line to remain in an unsecure condition. Both vessels were held liable to the seaman hurt in consequence of the neglect of the master to make the rigging safe. These two cases, together with the decisions of Judge Addison Brown in *The Frank and Willie*³ and *The Julia Fowler*,⁴ are referred to in *The Osceola* without disapproval. All are actions *in rem*, but the courts rendering the decisions made no distinction because of the form of procedure.⁵ In the second of the New York cases the district judge uses the following language: "The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of rigging, or methods plainly unsafe, affects both ship and owners with liability for the consequent damage." And the decision in *Scarff v. Metcalf*,⁶ cited by Mr. Justice Brown with his second proposition, rests expressly upon the ground that "the master stands as the agent and representative of the owners, and his negligence is theirs." As the action in that case was solely for *improper treatment after injury*, the conclusion is reached that the Supreme Court regards a failure to maintain the appliances of the ship in the same light as a failure to entertain proper care of a sick or injured seaman, and considers both cases as instances where an owner is liable for the neglect of the officers of the ship as the acts of his personal agents in the performance of positive duties imposed upon him.⁷

¹ 43 Fed. Rep. 592.

² 28 Fed. Rep. 855.

³ 45 Fed. Rep. 494.

⁴ 49 Fed. Rep. 277.

⁵ It is interesting to note in this connection that in *The Lamington*, 87 Fed. Rep. 752, the District Court for the Eastern District of New York found that the British Shipping Act gave a personal remedy against the ship-owner for unseaworthiness, but did not confer a right of action *in rem*.

⁶ 107 N. Y. 211.

⁷ The ship was held in *The Julia Fowler* for the negligence of the mate in furnishing a seaman with a defective rope and ordering him to use the same. The negligence complained of in *The Frank and Willie* was that of a mate in requiring libellant after notice to work in a dangerous place when discharging the ship's cargo, the court saying: "This was breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. . . . The principle involved, viz.: the duty to provide reasonable security against danger to life and limb, by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers, is manifestly a

It is for negligence alone that ship and owners are held. With respect to injuries resulting to seamen from latent defects not discoverable by the exercise of due care, there is no liability.¹

IV.

The requirements with respect to the equipment of a ship enumerated as the fourth cause of injury, are regulated in England and America largely by statute, but in neither country have the courts hesitated to hold both vessel and owners liable to a seaman for injuries resulting in consequence of the failure of the owners to fulfil the requirements of the law, in the absence of an exclusive remedy provided by the law. And the result is the same whether the neglect is that of the owners themselves, or of their agent, the master of the vessel.²

V.

The lower courts of the United States held for a long time without question that for any neglect on the part of the master or officers of a vessel to give a seaman proper care and treatment after he had been injured in the service of the ship, both ship and owners were liable to the seaman in consequential damages. The principle seems first to have been applied in *Brown v. Overton*,³ decided in March, 1859, on a libel *in personam* against the master. And it was subsequently stated by Judge Brown of New York in the *City of Alexandria*,⁴ in the following manner: ⁵

general one. It attends the seaman wherever he is required to go on shipboard in the performance of his duties, and applies as much to a dangerous condition of a cargo as to defective rigging or a rotten spar. . . . It has been long held the ship's duty to use all reasonable means to cure seamen of their hurts in the ship's service, neglect of which makes ship and owner liable. It would be anomalous to enforce such a duty to cure hurts, but none to avoid them."

¹ *The Lizzie Frank*, 31 Fed. Rep. 477; *The Concord*, 58 Fed. Rep. 913; *The Robt. C. M'Quillen*, 91 Fed. Rep. 685.

² Thus the court allowed consequential damages in the following instances: *Couch v. Steel*, 3 E. & B. 402, owners' failure to supply ship with medicines; *Collins v. Wheeler*, 1 Sprague (U. S. Dist. Ct.) 188, owners' failure to supply ship with proper food; *The F. F. Oakes*, 82 Fed. Rep. 759, master's failure to supply ship with proper food; *Baxter v. Doe*, 142 Mass. 558, master's failure to furnish seaman with suitable food and anti-scorbutics, — under British Merchant Shipping Act; *The Rence*, 46 Fed. Rep. 805, at 807, master's failure to furnish seaman with anti-scorbutics, — under U. S. Statutes.

³ 1 Sprague (U. S. Dist. Ct.) 462.

⁴ 17 Fed. Rep. 390, at 395.

⁵ Libellant was injured by falling through a hatchway negligently left open, for which alone the maritime law furnishes no indemnity.

"Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected the ship may be held to consequential damages."

Succeeding these decisions there has appeared a long line of cases holding both ship and owners.¹

This right of the seaman to hold ship and owners for acts of the master and subordinate officers was never doubted until after the appearance of the opinion of the Supreme Court in *The Osceola*. When *The Troop* (an action by a seaman against a British vessel for excessive and unnecessary suffering after he had been injured and permanently disabled by a fall from a yard arm of the ship) appeared before the Circuit Court of Appeals for the Ninth Circuit, Ross, Circuit J., dissented from the decision of the court, affirming a decree in favor of the seaman, on the ground "That by the law of England the ship is not liable *in rem* for the damages claimed, and that under the decision of the Supreme Court in the case of *The Osceola* the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew."² The majority did not think the English law prevented a recovery, and could not find in the general terms of the language of the Supreme Court in the principal case, that it was intended to establish "a rule narrower than that recognized by the more recent decisions of the federal courts, that the master and the crew are fellow servants only as to matters connected with the navigation of the ship, but that the master of a ship at sea represents the owners in respect to the personal duties and obligations which they owe the seaman."³ They furthermore pointed out that the opinion in *The Osceola* expressed no disapproval of the doctrine of *Brown v. Overton* and the *City of Alexandria*, but incidentally cited both cases. Judge Ross' quandary is one instance of the

¹ See for example *Peterson v. The Chandos*, 4 Fed. Rep. 645; *Whitney v. Olsen*, 108 Fed. Rep. 292; *The Iroquois*, 113 Fed. Rep. 964; s. c. 118 Fed. Rep. 1003; failure to put into port when practicable; *The Vigilant*, 30 Fed. Rep. 288; *The Scotland*, 42 Fed. Rep. 925; *The Troop*, 118 Fed. Rep. 769; s. c. 128 Fed. Rep. 856; failure to secure medical or surgical assistance when possible; *The City of Carlisle*, 39 Fed. Rep. 807; gross neglect and cruel treatment; *The Eva B. Hall*, 114 Fed. Rep. 755; wrongfully and unnecessarily compelling a seaman to work after he was injured.

² 128 Fed. Rep. 856, at 863.

³ *Ibid.*, at 858.

misconception we have referred to of the meaning of the fourth proposition in *The Osceola*, now happily determined; for the recent decision of the Supreme Court in *The Iroquois*,¹ affirming without a dissenting voice the decrees of the lower courts in favor of the seaman libellant for negligent treatment after injury, sustains the view taken by the majority judges and has put an end to all doubt as to the scope of the opinion in *The Osceola* with respect to such acts of negligence, at least so far as the liability of the ship herself is concerned.

The question under consideration seems never to have been adjudicated by a British court, but a careful review of the English law failed to convince the Circuit Court of Appeals in *The Troop* that there is any difference between the law of England and America as to the ship's duty to a seaman, after he has been injured in the service. In the absence of express authority, however, and in view of the strict interpretation which the English courts have placed upon the statutory rights of seamen, the matter is certainly not free from doubt.²

VI.

The state of the law upon the question of the liability of ship and owners for violence to the person of a seaman by other members of the ship's company is most unsatisfactory.

From the days of the maritime codes it has been deemed the duty of the master to protect a seaman, not only against the cruelty of his officers, but against any oppression or ill-usage on the part of other seamen.³ Failing to interfere in the seaman's behalf when such ill-treatment has taken place in his presence, or when he has been seasonably informed of the same, the master has

¹ 194 U. S. 240, Opinion by Mr. Justice Brown.

² This does not mean that the right of the seaman to proceed against the ship for general damages is absolutely denied in England. As witness *The Justitia*, 12 P. D. 145 (1887), in which the seaman recovered because the vessel was employed for a purpose different from that contemplated in the contract of shipment. The tendency seems to be to regard the Merchant Shipping Act of 1894 as providing a personal remedy only, except in the case of the seaman's claim for wages. See *The Troop*, *supra*, and *The Lamington*, 87 Fed. Rep. 752, at 755. But note the provisions of the statute cited by the Circuit Court of Appeals in the former case, and especially the proviso in the section relating to medical advice and attendance; 57 & 58 Vict. c. 60, s. 207 (4); Scrutton, *Merchant Shipp. Act* (1894) 162, note, citing *The Justitia*, *supra*.

³ Curtis, *Merchant Seamen* (1841) 26, 27.

always been held responsible in damages.¹ And at least two cases have held the ship for such neglect, on the ground that the master's failure to intercede is "in violation of the implied contract that such protection will be afforded."² In the first of these cases, Judge Hanford justifies his decision by saying, that the rule denying a right of action for injuries resulting from the negligence of the ship's officers is "not applicable in a case where the negligence complained of amounts to a breach of duty on the part of the owner or master of a ship, which owner or master is obligated to perform personally." And the obligation of the master while at sea to protect the crew from violence and brutal treatment he held to be such a duty. But in the recent case of *The Astral*,³ the District Court for the Eastern District of Pennsylvania dismissed a libel founded upon similar facts, for the alleged reason that *The Osceola* had authoritatively decided the ship and her owners were not liable in such an action. This ruling is founded upon Mr. Justice Brown's fourth proposition, and we shall consider later the correctness of its application.

While in *The Lizzie Burrill* (the second of the cases referred to) the master, as well as other officers of the ship, was guilty of an assault upon the seaman, the gravamen of the action is regarded by the court as the master's failure to furnish protection. We are now to consider the cases in which it was sought to hold ship and owners liable by reason of the assault itself; in the first place when committed by the master.

(a) In the common law case of *Gabrielson v. Waydell*, heard first in the state courts of New York,⁴ the seaman on being ordered by the mate to "turn to" answered that he was sick and not able to go on deck. Whereupon the captain of the vessel came to the forecandle and getting a reply similar to that received by the mate, struck the plaintiff a number of times with his fist and then kicked him in the leg, breaking the bone below the knee. Suit was brought to recover damages for the injury, both master and owners being joined as defendants, but the former was not served with process and the case went to trial against the

¹ *Thomas v. Lane*, 2 Sumn. (U. S. C. C.) 1; *Shorey v. Rennell*, 1 Sprague (U. S. Dist. Ct.) 407; *Hanson v. Fowle*, 1 Saw. (U. S. C. C.) 537; *Murray v. White*, 9 Fed. Rep. 562.

² *The Marion Chilcott*, 95 Fed. Rep. 688; *The Lizzie Burrill*, 115 Fed. Rep. 1015.

³ 134 Fed. Rep. 1017.

⁴ 135 N. Y. 1.

owners alone. The Court of Appeals of New York divided four to three for a reversal of the judgment of the lower court in favor of the seaman, the issue being stated by Gray, J. (who wrote the opinion of the court) as follows: "Whether the owners of a vessel can be made liable in damages for the wilful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas."

The trial judge proceeded on the theory that the captain was the representative or *alter ego* of the owner, and that the wilful and malicious nature of the captain's act constituted no ground for an exception to the liability of the owners, if the act were performed within the general scope or course of his employment, and he therefore left it to the jury to decide whether the captain acted in the line of his duty. The Court of Appeals were unanimous in believing the case was governed by the precepts of the admiralty, but the majority were of opinion that there was nothing in the evidence or in the principles of the maritime law which justified the act as coming within a proper or intended exercise of authority, especially as it was criminal in its nature. The minority took the ground that the plaintiff's injuries were the direct result of the owners' failure to observe their contract obligations and duties, saying that one of the guarantees which the maritime law has accorded the sailor and implied in his contract of shipment, is "that he shall have good treatment and be protected from unnecessary violence." This obligation they declared the master, acting as the representative of the owners, "deliberately violated,"¹ and the owners were therefore liable, there being no ground to distinguish the case in principle from *Scarff v. Metcalf*.

Failing to secure redress in the state court, the plaintiff then brought another action for the same cause in the Circuit Court of the United States for the Eastern District of New York,² and there he recovered, the court regarding the act as done by the master in his representative capacity, and stating that the action might be considered to be "rather for breach of duty of good treatment and care than for violation of the person," the position in fact taken by the dissenters in the Court of Appeals, to which dissent the federal court expressly refers.

All of the members of the appellate court were of the opinion

¹ 135 N. Y. 1, at 17 and 21.

² *Gabrielson v. Waydell*, 67 Fed. Rep. 342.

that master and seaman occupied the position of fellow servants in the general undertaking relative to the navigation and employment of the ship, the minority, however, differing in considering the captain's act as something more than the assault of one employee upon another. In England, also, master and seaman are said to be in a common employment, at least at the common law.¹ But the federal courts of this country in their interpretation of the fellow servant rule have been inclined to *exclude* the master;² and this brings us to the consideration of those cases in which the act of violence is committed by some officer other than the master. Does the American admiralty provide the seaman a remedy against ship and owners for such an offense, and if not, is it because they are fellow servants?

(b) In the case of *Hall v. Sims*³ (commonly cited as *The Gen. Rucker*) the owners of a steamboat were held liable for personal injuries sustained by the libellant as the result of a blow on the head dealt by the mate with a monkey-wrench. The mate and libellant were engaged in the common employment of unloading the steamer when the assault took place; and while libellant held the somewhat anomalous position of "roustabout" (half long-shoreman and half deck-hand), the court made no distinction because of the character of his employment, but mulcted the defendant on the general ground that, to quote directly:

"A mate driving a seaman or other laborer to speedier work or better work in loading the cargo, by blows, is acting for the owner, in any fair sense whatever."

No reference to the fellow servant rule is found in the opinion, although the case was avowedly decided upon common law principles. In *Memphis Packet Co. v. Hill*⁴ the facts were not dissimilar. There a deck-hand was designated by the mate of appellant's steamer (the mate holding at the time the position of master) to act as "captain of the watch" for the purpose of having some hay moved from one part of the boat to another, and while the boat was under way. As such captain the deck-hand became the boss of his co-laborers and they were required to obey his orders. Libellant was one of the deck-hands employed in moving the hay,

¹ See *Hedley v. Pinkney & Sons S. S. Co.* (1894), A. C. 222.

² *The Osceola*, 189 U. S. 158, at 175, Proposition 3; *The Troop*, 128 Fed. Rep. 856, at 860.

³ 35 Fed. Rep. 152.

⁴ 122 Fed. Rep. 246.

and while thus engaged he stopped to tie a handkerchief around his neck; whereupon the "watch-captain," without any cause or provocation, and for the purpose of compelling the libellant to work more rapidly, struck him with a heavy stick, breaking his arm. The company defended on the ground that it was not liable to one servant for injuries caused by the negligence of another. The court, however, unanimously held the fellow servant doctrine had no application to the case; that the two employees were not working side by side as fellow servants, but that the "watch-captain" was for the time being an officer of the vessel, as such was acting for the owner, and the owner was therefore liable for the assault.

(c) In neither England nor America does it appear that ship or owner has ever been held for the assault of one seaman upon another.

What are the principles governing the determination of causes involving the rights of seamen for personal injuries to be derived from this study of the law? First, it is to be noted as a fundamental proposition that, generally speaking, neither ship nor owner is liable to an indemnity for the physical hurts of seamen. The seaman's claim because of such injuries is restricted in the ordinary case to those perquisites which the maritime law, from its very beginning, has accorded the wounded or disabled mariner.¹ This general rule is a pure doctrine of the admiralty sufficient to decide the ordinary actions of seamen for injuries received aboard-ship without the assistance of any other legal principle or system of law, and so far as it recognizes the seaman, is construed most favorably to him. The only condition imposed upon the right of an injured seaman to the perquisites mentioned is that the injury must take place in the service of the ship and not be occasioned by the seaman's own fault, or happen while he is in the pursuit of his own pleasure. And the term "service of the ship" is an elastic one, being "by no means limited to acts done for the benefit of the ship or in the actual performance of the seaman's duty on board." It is enough if the injuries are received by him

¹ Laws of Oleron, Arts. VI., VII.; Laws of Wisby, Arts. XVIII., XIX.; Laws of the Hanse Towns, Arts. XXXIX., XLV.; Marine Ordinances of Louis XIV., Bk. III., Title IV., Art. XI.; and see *The City of Alexandria*, 17 Fed. Rep. 390. The right of the seaman to be returned to the port of shipment seems to be a later development.

in his capacity as seaman, for "a sailor must, in judgment of law, be deemed in the service of the ship whilst under the power and authority of its officers."¹ To work a forfeiture of his right, the mariner's wound or disability must have resulted from "vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience of orders, and persistent neglect of duty."² "Ordinary negligence consistent with good faith and an honest intention to do his duty is not sufficient."³

Such being the fundamental law, the decisions allowing the recovery of damages are, in fact, nothing less than exceptions. The exceptions have been made by the courts in two classes of cases: first, where there has been the breach of a positive duty owed the seaman; and second (in the case of injuries resulting from the violence of another person), where the offender has been an officer of the vessel, and at the time about the business of the ship and acting in the owners' behalf. In both classes ship and owners are said to be liable to the seaman beyond the mere expense of caring for and curing him, and providing his passage home. The ground of liability in the first instance is, in reality, *breach of contract*, although the action may sound in tort, and the principle involved is not unlike that of the common law which refuses to deny recovery to the workman on land, when the employer has failed to perform one of his so-called non-assignable duties. The contract in question in the maritime law, however, is usually evidenced by a writing—the shipping articles—which are executed by both owners and seaman, the former binding themselves through their agent, the master. The second ground of liability is to be found in the law of agency. The seaman's contract is ordinarily broken by some act of negligence. The act which makes an owner liable as principal, on the other hand, is an intentional wrong.

In considering the question of the responsibility in damages of ship and owners for breach of the shipping contract, the difficulty presented does not concern either the existence or the justice of the principle involved, but arises with the problem as to just what duties are imposed upon ship and owners with respect to seamen by the maritime law, for the shipping articles commonly do not

¹ Ringold v. Crocker, Abb. Adm. 344, at 346, per Betts, J.

² The Ben Flint, 1 Biss. (U. S. C. C.) 562, per Miller, J.

³ The Chandos, 4 Fed. Rep. 645, at 651.

set forth all of the obligations which the law implies. That a ship owner is under certain obligations to the crews of his vessel by virtue of their entry into his service has never been denied. Some of these obligations are well defined. Others have been suggested, but have not, as yet, received the consideration or approval of the highest tribunals. Thus we have seen that in America, at least, there is a positive duty to accord good treatment to a seaman after he has been injured in the service of the ship, and that for the failure of the officers to fulfil the obligation ship and owners are liable in consequential damages.¹ Also the owners must see to it that the rigging and appliances of the ship are at all times reasonably safe and that they are not negligently allowed to become defective, else they and the vessel will be liable to the same extent for an injury resulting to one of the crew.² And the neglect to supply the ship with food and medicines in accordance with the positive law of the country, and to furnish them to the crew during the voyage, is the breach of another duty which gives the seaman the right to claim compensation from ship and owners for his suffering.³ The seaman, to be sure, can recover only once, but he has an election whether to proceed *in personam* or *in rem*.

Are there any further obligations of the same character? Judge Hanford added one, to wit: the obligation to furnish protection to the mariner while in the service,⁴ and his view seems to be supported by authority. In his "Treatise on Merchant Seamen" Mr. George Ticknor Curtis takes pains to enumerate what he terms "certain of the general obligations of the parties to the mariner's contract," saying: "Although the articles are wholly silent upon such points, law and reason will imply certain engagements on the part of the master and owner to the mariner which are equally as imperative as those expressed in writing."⁵ Among the obligations thus set forth, and as a result of the failure

¹ The Iroquois, 194 U. S. 240.

² The Osceola, 189 U. S. 185, at 175, Proposition 2. And this means that the vessel must be seaworthy and properly equipped in all particulars. If she is sent to sea improperly manned, the owner has not done his full duty. *Brown v. The D. S. Cage*, 1 Woods (U. S.) 401; *The Lizzie Frank*, 31 Fed. Rep. 477, at 480.

³ *Dixon v. The Cyrus*, 2 Pet. Adm. (U. S. Dist. Ct.) 407, at 411, and cases cited under IV, *supra*.

⁴ *The Marion Chilcott*, 95 Fed. Rep. 688.

⁵ Curtis, *Merchant Seamen* 19, adopting the language of Judge Richard Peters. See *Dixon v. The Cyrus*, 2 Pet. Adm. (U. S. Dist. Ct.) 407, at 411; *Rice v. The Polly and Kitty*, *ibid.* 420 at 421.

to perform which, injury may result to a seaman, are given the three which we have mentioned as unquestionably established. Mr. Curtis's fifth general obligation is, "That the mariner shall be treated with decency and humanity by the master and the officers and by his ship-mates."¹ The learned author then proceeds to discuss the duty of the master to accord protection. Granted the existence of this obligation as a contractual duty, any breach of it upon the part of the master ought to make the vessel owners liable, as the act of their personal agent, to no less extent than in the case of the other positive duties imposed by the law. And being persuaded that the obligation does so exist, we are compelled to differ with the decision of the court in *The Astral*,² heretofore referred to. In that case Judge McPherson said he was "unable to draw a tenable distinction between the master's fault in giving a wrong order, which was the negligence complained of in *The Osceola*, and his fault in failing to maintain proper discipline on the ship and to protect the members of the crew from abuse at the hands of subordinate officers," closing as follows: "Neglect of duty is negligence, and for negligence on the part of the master it has now been authoritatively decided that the ship and her owners are not liable in an action of this kind." It is respectfully submitted that there is a difference between the faults committed by the masters in these two cases, and that the ruling of the district judge is a misapplication of the fourth proposition set forth by Mr. Justice Brown. The neglect of duty complained of in the case before the Supreme Court was committed in the ordinary course of the navigation of the ship, the breach of the commonplace obligation upon the part of one person to use due care not to injure another, for which sort of negligence the maritime law prescribes no right to an indemnity from the owners because in no way personal to them. The neglect in *The Astral*, on the other hand, was a breach of duty of the positive sort imposed upon the owners as a personal matter by virtue of the seaman's contract with them. We do not believe that the Supreme Court intended so sweeping an interpretation as that of the District Court to be placed on the fourth proposition in *The Osceola*, otherwise the force of the second proposition is destroyed, and to follow out Judge McPherson's decision that any neglect of duty is negligence for which the ship and her owners

¹ Merchant Seamen 26.

² 134 Fed. Rep. 1017.

are not liable, we should be obliged not only to deny recovery in the case of injuries resulting to seamen from unfit appliances, but also to override the decision in *The Iroquois*. Logically to deny liability in cases like *The Astral* it is incumbent upon the courts to decide that the duty to protect is not implied in the seamen's contract of service, and then we should face the anomaly which Judge Addison Brown has described in *The Frank and Willie*, namely, that of enforcing "a duty to cure hurts, but none to avoid them." We believe the duty to protect seamen against unnecessary violence is implied in their contract of service, and that both ship and owners are liable for the master's neglect with respect to this important obligation, and we maintain also that the fourth proposition of Mr. Justice Brown is confined to negligent acts incident to the *handling* of the ship and to the performance of the ordinary labor of officers and seamen with respect to the ship and her cargo.¹ The Supreme Court was restricted by the questions expressly stated in *The Osceola*,² to the decision of the ship's liability for a "negligent order of the master in respect of the *navigation and management of the vessel*," and "*under the circumstances declared*." The opinion is, therefore, not to be given any broader interpretation.³

Further than the duty just discussed, which must be performed by the master, is there any general obligation imposed upon the owners to furnish the seaman at all times with good treatment, and, if so, what officers are included in its performance? That such an obligation is implied in the contract of shipment to the extent of making the owners liable for maltreatment of a seaman by the *master*, was the opinion of the minority judges in *Gabrielson v. Waydell*,⁴ relying upon both text-books and cases, and the same view seems to have been taken by Judge Wheeler in the United States court. If the decision in the Circuit Court hinges entirely on the fact that the seaman was sick when assaulted by the master, then the rule to be derived from the case is but a statement in a different form of that promulgated by Judge Sprague in *Brown v. Overton*, and may be written: that for any misconduct toward or maltreatment of a seaman after he has *fallen sick* in the service of the ship, the vessel and her owners are liable in damages. That

¹ Cf. *The Gov. Ames*, 55 Fed. Rep. 327; *The City of Alexandria*, 17 Fed. Rep. 390.

² 189 U. S. 158, at 160.

³ See *The Troop*, 128 Fed. Rep. 850, 858, 861.

⁴ 135 N. Y. 1, at 16-20 especially.

is, so far as the obligation of the owners to care for the seamen is concerned, there is no difference whether they are disabled by sickness or injury, and this is unquestionably the law.¹ No reason suggests itself for making a distinction, and the duty is ordinarily stated in the text-books to include both causes of disablement.² But we believe that Judge Wheeler intended to state a broader ground of liability and to declare a vessel owner liable for any failure of the master to accord proper treatment to the crew, whether sick or well. The language used by the learned judge is, "To wrongfully make a seaman *sick or sicker* would seem to be as much a breach of the duty to cure as wrongful neglect to cure existing sickness would be."³ The duty referred to by the court is the duty to cure, but the principle involved is the same. Indeed Judge Betts says in *The Atlantic*:⁴ "The term *cure* was probably employed originally in the sense of *taking charge or care of* a disabled seaman and not in that of positive healing."⁵

Both law and reason seem to point to the liability of vessel and owners for the master's personal failure properly to treat a seaman as well as for his neglect to enforce good treatment of the mariner by others. That this duty of the master to refrain from personal acts of violence has not always been held to be a contractual one, and especially of the sort for the breach of which the owners are responsible, is undoubtedly true. For while, in the case of *Croucher v. Oakman*,⁶ the Supreme Court of Massachusetts held the owners of a bark liable in contract to the mate, for an injury sustained by the

¹ *Reed v. Canfield*, 1 Sumn. (U. S. C. C.) 195; *The Ben Flint*, 1 Biss. (U. S. C. C.) 562; *The A. Heaton*, 43 Fed. Rep. 592, at 595; *cf. The Iroquois*, 194 U. S. 240; *Laws of Oleron*, Arts. VI., VII.; *Laws of Wisby*, Arts. XVIII., XIX.; *Laws of Hanse Towns*, Arts. XXXIX., XLV.; *Ordinances of Louis XIV.*, Bk. III., Title IV., Art. XI.

² 2 Parsons, Shipp. and Adm., 1869 ed., 81; *Curtis, Merchant Seamen* 27-28; *Abbott on Shipping*, Part 2, ch. 6, s. 3.

³ 67 Fed. Rep. 342, at 344.

⁴ *Abb. Adm.* 451, at 480.

⁵ Although the decision of the Circuit Court in the *Gabrielson* case rests in part upon the opinion of the Supreme Court of the United States in *Railway Co. v. Ross*, 112 U. S. 377 (holding the conductor of a train not to be a fellow servant of the engineer), a case which has been considerably shaken by later adjudications of the same tribunal (*R. R. Co. v. Baugh*, 149 U. S. 368, and *R. R. Co. v. Conroy*, 175 U. S. 323), the circumstance does not affect the force of Judge Wheeler's reasoning upon the maritime principle involved. And indeed he would have no cause to reach a different result to-day when it is considered that the third proposition in *The Osceola* fails to include the ship-master in the enumeration of those engaged in the common employment aboard the vessel.

⁶ 3 Allen 185.

act of the master in wounding and discharging him in a foreign port, the district court of the same state in a similar case — brought against the master — did not comprehend the personal tort to be a violation of the contract of hiring.¹ But if the master is under an obligation to protect his crew, then, *a fortiori*, his own maltreatment of the seaman is a denial of the protection, and ship and owners are liable whether we describe the offense in words of ill treatment or not. And the liability follows whether the master is acting "for the owner" or is merely satisfying a personal grudge. Either is a breach of the positive duty owed the mariner.

Undoubtedly a vessel owner is liable to a third party for such acts only as are committed by the ship captain when acting within the scope of his employment, but a seaman is not such a stranger. He and the owners are bound together by contractual ties, and by contract the ordinary duties of one person to another, in the community, can be greatly extended. The additional obligations need not always be expressed. They are sometimes implied, as in the case of the carrier. The law imports many promises into the contract of a carrier with its passengers. One is that the passenger shall be carried safely, and if he be injured through the carelessness or violence of the carriers' agents, the passenger has a right of action to recover damages for breach of the contract. We see no reason why the seamen's claim to compensation for physical injuries cannot be founded upon a similar principle.² Nothing can be gained by regarding the seaman's suit for damages as a claim for "additional wages."³ Indeed we maintain that, except as given in the form of a penalty by statute, no wages can be recovered for any period beyond the termination of the contract of service by the completion of the voyage shipped for. The exception established by Judge Woods in *Meyers v. Hopkins*,⁴ allowing the seaman wages until restored, regardless of the ending of the voyage, in the case of injuries received through the negligence or misconduct of an

¹ See *Crapo v. Allen*, 1 Sprague (U. S. Dist. Ct.) 184.

² See 2 Parsons, Shipp. and Adm. 26 *et seq.*, at 29 and 30 especially; Benedict, Admiralty, 3d ed. § 309. In *Spencer v. Kelly*, 32 Fed. Rep. 838, the court charged the jury, "To make the defendant liable for the conduct of the master of his vessel, it must be shown that in the infliction of the injury complained of in this case the master was acting within the scope of his duty as such master, and in the exercise of his control over the plaintiff on that occasion." But the cause was not regarded by the court as anything more than an action of tort.

³ See *Brown v. The Bradish Johnson*, 1 Woods (U. S.) 301.

⁴ 1 Woods (U. S.) 170, cited under 1, *supra*.

officer, is, it is submitted, unsound in principle. Furthermore the seaman does not sue for wages alone. His action is ordinarily described, in the technical language of the libel, as a *cause of damage*, or of *damage for personal injuries*.¹ This is comprehensive and would seem to embrace all the damage he has suffered by reason of his injury, physical and otherwise. He asks for the expenses of his maintenance and cure and for the wages of the voyage, if the ship has not paid these bills as the maritime law requires, and in addition he seeks damages for the assault or injury itself.²

Whatever ground is taken as the correct one for holding ship and owners for an act of violence committed by the master upon a seaman, there does not seem to be any justification for the decision of the Court of Appeals in *Gabrielson v. Waydell*. In the first place, there was sufficient evidence to warrant the jury in finding that the plaintiff was sick upon the occasion in question, and that he had a reasonable excuse for his failure to give prompt obedience to orders. The master's brutal assault upon him was, therefore, a neglect to accord that treatment and care which the maritime law has always stipulated should be furnished the disabled mariner, with a resulting liability upon ship and owners for breach of the obligation. And furthermore, leaving out of consideration the existence of any duty upon the part of the master to *protect* a seaman from injury — by the acts of others or by his (the master's) own acts — it is submitted that the conduct of the master in this case was so much within the line of his duty as to make the owners liable under the law of agency. Had the master assaulted Gabrielson out of mere spite, it might very well have been questioned whether the owners were liable for the offense as principals; but the facts do not present such a case. The blows were delivered, as the evidence shows, in the course of the master's endeavor to secure obedience from, as he supposed, a refractory seaman, and the mere fact that he may have misjudged the plaintiff or have used more force than was reasonable and necessary does not make the act any less one within the scope of his employment or release the owners from liability. It is now well recognized that the wilfulness of the agent's act is no excuse,

¹ See Curtis, *Merchant Seamen* 337, speaking of a libel for assault.

² *Cf.* *The City of Carlisle*, 39 Fed. Rep. 807, at 817; *The Troy*, 121 Fed. Rep. 901, at 906; *The Svealand*, 132 Fed. Rep. 932; s. c. 136 Fed. Rep. 109; and see also *C. Oakman, supra*, at 188; *Memphis Co. v. Hill*, 122 Fed. Rep. 246, at 247.

if the act were within the general scope of the authority conferred upon him, and the character of wilfulness, *per se*, does not place the act without the limits of such authority.¹

Excepting the liability for failure of the master to treat his crew with decency, we have not been able to discover any general obligation to accord the seamen good treatment so imposed by the maritime law as to make ship and owners liable to an indemnity for injuries occasioned by a single act of violence upon the part of some other officer. Both books and cases contain frequent allusions to the humane character of the treatment which the mariners must receive on board ship;² but the language used is very general, and in place of prescribing a duty which the ship-owners must perform through all the officers, is, we believe, but a description of the master's duty to protect the seamen and keep the peace at sea. Thus Lord Tenderden says,³ "The duties of the mariners and the master are reciprocal; from the former are due obedience and respect, from the latter, protection and good treatment." We are led to the conclusion that the duty to furnish good treatment to the mariner and to protect him from ill treatment are one and the same obligation, and that a breach is committed only by the master's failure to see that the obligation is carried out. Unless, therefore, the misconduct of an inferior officer consists of frequent acts of oppression or violence, so that the master must be said to be in fault for not interfering in the seaman's behalf, or unless a single assault takes place in the master's presence, in such a way that he can be said to have made it his own, the seaman would seem to have no remedy because of his

¹ It is difficult to appreciate the weight of Judge Gray's contention that the owners were not liable because the master's act was "criminal in nature"; for the offense was civil as well, and as such quite within the scope of his authority as commanding officer of the vessel. Hence the owner's *civil* liability would not seem to be affected. See *Mechem*, Agency § 745. The decision may be explained by the peculiar reluctance of the common law courts of New York to regard a wilful act as one committed in the course of the agent's employment: see *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Rounds v. R. R.*, 64 N. Y. 129; and Mr. Curtis seems to have entertained a similar view of the limit of the principal's liability. *Merchant Seamen*, 339-340. But this view we apprehend is not law to-day in most jurisdictions. *Mechem*, Agency §§ 740-741; *Hughes*, Admiralty § 106, note.

² See 1 *Parsons*, Maritime Law, 1859 ed., 476; *Kay*, Shipmasters and Seamen, 2d ed., 331; *Curtis*, Merchant Seamen 26; *Rice v. The Polly and Kitty*, 2 Pet. Adm. (U. S. Dist. Ct.) 420; *Magee v. The Moss*, Gilp. (U. S. Dist. Ct.) 219, at 228; *Gould v. Christianson*, Blatchf. & H. Adm. 507; *The Lizzie Burrill*, 115 Fed. Rep. 1015.

³ *Abbott*, Shipping, Part 2, c. 4, s. 3.

contract with the owners. And the seaman is thus barred from recovery if the motive of the subordinate officer is personal to him. For an owner is liable under the law of agency, as we have found, only when the officer is acting within the scope of his employment. Furthermore, if there be no guaranty of good treatment by all the officers at all times, binding the ship, the *res* itself cannot very well be held liable for the act of the individual officer. The case is different from that of injuries occasioned by collision, or by a physical act such as was perpetrated in a recent case by a tugboat, rightly named *The Bulley*.¹

It might be well for the uniformity of the maritime law if the rights of seamen to general damages for physical injuries were made to depend entirely upon contract, but until the highest courts sanction a construction of the shipping contract so liberal as to include the duty of good treatment in its most comprehensive sense, his rights must be governed in part by the law of agency. In opposition to the liberal interpretation of the seaman's contractual rights, it will undoubtedly be suggested that it is extending the vessel owners' liability to too great an extent, and so much so as to be unjust, to hold him for all the tortious acts of the ship's officers towards a seaman. And the objection is certainly of great weight. But when we consider the peculiar nature of the employment of a ship,—by owners who remain at home with almost no supervision over their property after the vessel sails from port, so that by necessity great responsibility is vested in their agents for the voyage,—the hardship is more apparent than real, and if either party is to suffer by reason of the situation it should be the owner and not the sailor. The officer is liable over to the owners for his misconduct; and if the former be financially worthless the owners are better able to bear the loss than the injured mariner. Furthermore, the admiralty does not award damages for personal injuries with the same liberality as do courts of law.² Nevertheless, the wisdom of adopting too sweeping a construction may well be doubted.³

One thing, however, seems clear in principle, which is, that if

¹ 138 Fed. Rep. 170, ranging alongside another vessel and deluging her with steam and hot water.

² See *The Gen. Rucker*, 35 Fed. Rep. 152, at 158.

³ And yet it is difficult to term that law satisfactory which excuses an owner if his officer is careful to exercise his brutality upon a well seaman, but declares him responsible should the mariner happen to be ill.

the seaman be denied a right of action against the owners for a hurt received as the result of an uncalled-for assault by a subordinate officer, not connected with the performance of his personal duties, it is *not* because they are fellow servants. The seaman's status is *sui generis*, totally unlike that of workmen on land, and the fellow servant doctrine, it is respectfully submitted, is not amphibious. After they had adopted the doctrine the federal courts did not construe it to cover all the relations of the ship's company. Thus we find Judge Addison Brown, in *The Scotland*,¹ a case of negligent treatment after injury, making this statement: "The obligation of the master in this respect was an obligation wholly independent of their relation as fellow servants in navigating the ship." And we quote again the words of the Circuit Court of Appeals in *The Troop*: "The master and the crew are fellow servants only as to matters connected with the navigation of the ship." In *The Osceola*,² however, the Supreme Court did not find it necessary to express an opinion on the second question suggested by the lower court, namely: "Whether in the *navigation and management* of a vessel, the master of a vessel and the crew are fellow servants," although they subsequently declared, in a *dictum*, that the other members of the ship's company were so related. The case was decided by answering the other questions presented by a resort to the maritime law, the court holding that, according to well-recognized principles of the admiralty, the ship was not liable in damages for the negligence complained of. The point we desire to impress is, therefore, this: if it is unnecessary to turn to the common law to decide that a ship is not liable for the negligence of the *master* in matters of the vessel's navigation and management, it is unnecessary also when the negligent act is that of some other officer. And the case is not different when in place of negligent navigation and management we have an intentional wrong committed on board the ship, or in the course of her employment, whether the act is connected with the offender's duties or wholly outside them. The fellow servant doctrine in both instances is superfluous.

In *The Iroquois*³ Mr. Justice Brown says: "The general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is

¹ 42 Fed. Rep. 925.

² 189 U. S. 158, at 160 and 168.

³ 194 U. S. 240, at 243.

peculiarly applicable to the case of seamen."¹ Not even at common law, however, does the employee assume the risk of injury through the employer's failure to fulfil his positive duties.² Nor, furthermore, would it seem the risk of injury by the abusive treatment of a superior placed over him with authority to command him, as in the case of a seaman.³ The law certainly justifies the conclusions reached in *The General Rucker and Memphis Co v. Hill*. The power of the ship-master over seamen is great, including, as it does, the right to punish for offenses, a prerogative in no way possessed by foremen or superintendents on land. To say, therefore, that master and seaman are "fellow servants" when the former is exercising this authority is little short of the ridiculous. Nor can we perceive the relation of fellow servants to exist when a subordinate officer of a vessel is exerting his authority, as a commander, to compel obedience to his lawful orders. If the master act with moderation, when chastising a seaman, neither he nor the owners are liable. If he exceed the bounds of reasonableness, the act is a breach of the seaman's contract. And similarly, if the subordinate officer act immoderately, the owner must bear the consequences according to the accepted rules of agency, if the command and its attempted enforcement took place in the course of his employment. Otherwise there is no liability at the maritime law.

Under no doctrine of the admiralty can ship or owners be held in damages for the act of one seaman in assaulting another, unless at the time the offender happens to be acting as an officer of the vessel, assuming, of course, that there is no neglect on the part of the master.

Rule 16 of the Admiralty Rules of the Supreme Court provides that, "In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." As a result the federal courts have persistently refused to entertain jurisdiction of a damage claim for an assault, when joined with a libel *in rem* for wages.⁴ But where

¹ But see *Rothwell v. Hutchinson*, 13 Ct. of Sess. Cas. (4th ser.) 463.

² 1 *Labatt, Master and Servant* §§ 2 and 270; *Kalleck v. Deering*, 161 Mass. 469, at 470, 471.

³ See *Wood, Master and Servant* 875; 2 *Labatt, Master and Servant* § 537, at p. 1540.

⁴ See *The Guiding Star*, 1 Fed. Rep. 347, and cases cited; *The Lyman D. Foster*, 85 Fed. Rep. 987; *The Falls of Keltie*, 114 Fed. Rep. 357.

the libel has proceeded on the theory that the master was at fault in not preventing the act of abuse, a proceeding against the ship has been sustained notwithstanding the rule,¹ and even when the master joined in maltreating the seaman.² The reason given for the exception is that the action is founded upon something more than the mere tort because of the existence of a distinct duty on the part of the master. In other words, the gravamen of the complaint being breach of contract, the 16th rule does not exempt the ship from seizure merely because the act constituting the breach consisted of an "assault or beating." And this view is supported by no less an authority than the learned author of Benedict's Admiralty.³ We respectfully submit that it is sound.

The conclusions reached may be summed up as follows:

(1) That in the case of an injury by *accident*, the seaman is entitled to no indemnity.

(2) That in the case of an injury resulting from *negligence* there is likewise no right to an indemnity, unless the act or acts of negligence constitute a breach of some contractual duty.

(3) That in the case of an *intentional* injury no indemnity can be recovered, unless the wrong also amounts to a breach of a contractual duty or unless the offender was at the time acting as the agent of the owner and within the scope of his employment.

(4) If *any* injury happen while the seaman is in the "service of the ship," he is entitled to maintenance and cure, to his wages and a passage back to the port of shipment, or the cost of the same — in the absence of wilful misconduct upon his own part.

(5) If an *intentional* injury is a breach of the shipping contract, the ship, in America, is liable *in rem*.

These statements, we believe, represent the law. The questions to be settled include the enumeration and definition of the implied obligations of the shipping contract (especially with respect to the

¹ The Marion Chilcott, 95 Fed. Rep. 688.

² The Lizzie Burrill, 115 Fed. Rep. 1015.

³ The American Admiralty, by E. C. Benedict, 3d ed., § 309, but see The Guiding Star, 1 Fed. Rep. 347, at 348. In The Miami, 78 Fed. Rep. 818, Judge Toulmin dismissed a libel *in rem* by a "stowaway," seeking damages for personal injuries inflicted by the master, on the ground that the libellant was a trespasser and there had been no breach of a contractual or maritime duty owed him, declaring that the suit was not in the nature of an action upon the case (as contended by libellant), but an assault and battery and hence within Rule 16. This judge was also the author of the opinion in The Lizzie Burrill.

treatment due the mariner), the delimitation of the duration of the disabled mariner's right to cure and maintenance and of the period during which he is entitled to wages, and a decision as to the adaptability to the admiralty of the fellow servant doctrine.

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RESPONDEAT SUPERIOR IN ADMIRALTY.

THAT there could hardly be greater injustice than to take A's property and give it to B because C has injured B seems clear, yet that is the result of the maxim *respondeat superior* plainly stated. It does not help the matter to explain that C was A's servant and was doing A's work at the time, if no fault can be brought home to A, either in the selection of his servant or in any other way. If this same act of C's is criminal, logic requires that A should also be liable criminally for the same act of his servant, but our courts have never gone so far as that. The common law courts have, however, carried this doctrine, according to Sir George Jessel, Master of the Rolls, "very far indeed," "quite far enough,"¹ and have been at times at great pains to introduce exceptions, mitigating the harshness and severity of it, whenever they could, as, for example, denying the liability of the master to a servant for negligence of a fellow servant. Mr. Justice Holmes, in two articles on Agency in the HARVARD LAW REVIEW,² shows clearly the injustice of the maxim, and says in effect that it is a legal fiction resting on no ground of logic or good sense, but so entwined into our common law as to be ineradicable; that the reasons given for it by judges are neither good nor consistent. It would seem, then, that there should be no desire on the part of any one to extend a doctrine so unjust, but that the object should be to keep it within its present limits or even to restrict it. Judge Ware, in the case of *The Rebecca*,³ discusses admirably the question as a matter of natural law and justice, and says: "But as it is a rule founded merely in expediency and not in natural justice, except so far as the principal has derived a benefit from such acts, *public policy* must also determine to what cases the rule shall extend."

The purpose of this paper is to show that the doctrine has no place in the admiralty law, and that nevertheless it has been quite recently inadvertently and unnecessarily introduced and carried by the admiralty courts in certain directions even farther than at

¹ *Smith v. Keal*, 9 Q. B. D. 351.

² 4 HARV. L. REV. 345; 5 *ibid.* 1.

³ 1 Ware 187, at 206.

common law, and that, having imported the doctrine in recent years into the maritime jurisprudence, the admiralty courts are now applying common law rules in trying to limit it, instead of applying at the outset the rules of the admiralty law governing such cases, which have been nicely adjusted and made uniform in various countries during centuries of commercial intercourse.

Actions in admiralty are divided into two great classes, actions *in rem* and actions *in personam*. Actions arising *ex delicto* may be brought either *in rem* or *in personam*. It is only with actions arising *ex delicto* that we need concern ourselves, for *respondet superior* in its proper sense does not apply in any other kind of action. Now, in actions *in rem* in admiralty for damage, or *ex delicto*, the liability of the *res* is a thing by itself, peculiar, unlike anything at common law: the *res* is personified, is sued and proceeded against and brought into the custody of the court, and is held liable on grounds which are entirely distinct and apart from the fault or liability of the owners. The liability of the *res* and that of its owners *in personam* are by no means coextensive and identical.¹ For instance, a vessel under charter, though navigated by the charterer and his crew, is liable *in rem* for a collision, but the owners of the vessel would not be liable *in personam*.² The vessel is treated as "an offending thing," and is liable *in rem* to those whom she injures without regard to the persons who are navigating her. The liability *in rem* does not depend upon the liability of her owners resting upon their responsibility for the acts of their servants. In other words, the liability does not rest upon *respondet superior* at all. Judge John Lowell even went so far as to say that if a ship were stolen from her owners and navigated by pirates, she would be liable *in rem* for a collision occurring while so navigated, if she could be shown to have been violating the rules of safe navigation.³

¹ Workman v. New York City, 179 U. S. 552, 573; Crisp v. U. S., etc., S. S. Co., 124 Fed. Rep. 748, 749.

² Clifford, J. in The China, 7 Wall. (U. S.) 53-70; Homer Ramsdell Co. v. Compagnie, etc., 63 Fed. Rep. 845, 851; The F. C. Latrobe, 28 Fed. Rep. 377-379.

³ The Arturo, 6 Fed. Rep. 308, 313; The Malek Adhel, 2 How. (U. S.) 210, 233, 234; Sherlock v. Alling, 93 U. S. 99, 108; The China, 7 Wall. (U. S.) 53, 68; Raili v. Troop, 157 U. S. 386, 402, 403; The John G. Stevens, 170 U. S. 113, 120; Workman v. New York City, etc., 179 U. S. 552, 573; The Barnstable, 181 U. S. 464, 467, 468; The Bulley, 138 Fed. Rep. 170; Henderson v. Cleveland, 93 Fed. Rep. 844, 846, 847; Thompson Nav. Co. v. Chicago, 79 Fed. Rep. 984, 985; The Belknap, 2 Low. 281-283; The R. B. Forbes, 1 Sprague (U. S. Dist. Ct.) 328; The Ticonderoga, Swa. Ad. 215; The Ruby Queen, Lush. 266.

A careful perusal of the authorities above referred to cannot fail to convince any one that the liability *in rem ex delicto* in the admiralty has no connection with the law of master and servant or with the maxim *respondeat superior*.

Actions *in personam* in admiralty are much less common than actions *in rem*. It is so much easier to arrest the *res* and at once get good security, a sale if necessary, clear of all prior liens, and avoid all embarrassing questions as to joinder of parties, ownership, etc., that it is always done when it is possible. Still it is sometimes necessary to proceed *in personam*, and in these cases also in recent times our courts of admiralty (certainly the lower ones) have inadvertently and unnecessarily as it seems, introduced and expanded the doctrine of *respondeat superior*.

"The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to the ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors."¹

But later, for convenience, a personal liability was admitted, which the owner could limit to the value of his share in the vessel.² This personal liability, however, was not coextensive with the liability *in rem*.³ And it did not depend upon the civil nor common law of master and servant, nor upon the maxim *respondeat superior*, as shown above.

Judge Story lays down the rule for this class of actions in *The Marianna Flora*,⁴ repeated in *The Palmyra*,⁵ and approved by Judge Blatchford delivering the opinion of the Supreme Court in *The Max Morris*.⁶ It is this:

In cases of marine torts courts of admiralty exercise a conscientious discretion, give or withhold damages upon enlarged princi-

¹ Mr. Justice Swayne in the case of *The China*, 7 Wall. (U. S.) 53, 68; repeated by Mr. Justice Gray in *The John G. Stevens*, 170 U. S. 113, 122; and in *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 413. See also *The Rebecca*, Ware 187; *The Bulley*, 138 Fed. Rep. 170, 172, 173; *The F. C. Latrobe*, 28 Fed. Rep. 377-379; *Ralli v. Troop*, *supra*.

² *The Rebecca*, Ware 187; 15th Adm. Rule of Sup. Ct. of U. S.; *The F. C. Latrobe*, 28 Fed. Rep. 377-379; *Henderson v. Cleveland*, 93 Fed. Rep. 846, 847; Admiralty Rule 54 *et seq.*

³ *Workman v. New York City*, 179 U. S. 552, 573; *The F. C. Latrobe*, *supra*.

⁴ 11 Wheat. (U. S.) 1, 54.

⁵ 12 Wheat. (U. S.) 1, 17.

⁶ 137 U. S. 1, 13.

ples of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law.

This does not mean, of course, that the conscience and discretion of the judge are substituted for definite rules of law. Such a construction would be contrary to all our ideas and traditions; but it certainly does mean that the narrow and technical rules of the common law should not be brought in, where the more liberal and elastic rules of the admiralty are as just and effective, and that these rigid and narrow rules did not then obtain in admiralty, so far as marine torts were concerned.¹

We come, then, to consider what are some of the admiralty rules governing the liability of ship-owners *in personam* in actions *ex delicto*, if *respondeat superior* is not the rule in that jurisprudence. The original liability in marine torts was only *in rem*, as shown above. This liability has now been extended to embrace actions *in personam*, for damage occurring through the negligence of the owners themselves or with their privity, and actions *in personam* for damage occurring by collision caused by bad navigation of the ship, *if navigated by the servants of the ship-owners*. This last extension, however, is rather one of convenience and conscientious discretion, giving the injured party a greater opportunity to get jurisdiction of the offender, and at the same time limiting the doctrine of the offending thing, and it is not to be regarded as a general introduction of *respondeat superior* into the admiralty jurisprudence.

In collision cases the owner is liable *in personam*, if the ship is being navigated by the owner or his servants, on the ground *sic utere tuo ut alienum non laedas*,² not on the ground of *respondeat superior*. If it is navigated by a charterer or his servants or a compulsory pilot, the owner is not liable *in personam* because he is not navigating the ship, but it is only to collision cases that this rule applies, and it is not on the ground of *respondeat superior*, as

¹ Judge Choate says, in *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 63 Fed. Rep. 845, 854, that the liability of the owners *in personam* is the same in admiralty as at common law, and cites *The Germania* (9 Ben. 356); but this is a mistake, *e. g.*, they are liable in admiralty for one-half damages, though the libellant is guilty of contributory negligence. *The Max Morris*, 137 U. S. 1, 15.

They are not liable in admiralty for damages to a seaman injured by negligence of master, but only for maintenance and cure. *The Osceola*, 189 U. S. 158.

(These were actions *in rem*, but the reasoning and language cover equally actions *in personam*.) See also *Workman v. New York City, etc.*, 179 U. S. 552, 562, 563.

² *The China, ubi sup.* at 68.

shown above. The owner is not liable for negligence in other cases of marine *tort* as a general rule, unless he is privy to it.¹

Eliminating collision cases and all classes of cases mentioned in the note (3), the only case decided by the Supreme Court of the United States, which looks towards a liability of an owner *in personam* for the negligence of his servant, to which he was not privy, is *Leathers v. Blessing*,² where a master who was part owner was sued jointly *in personam* with the other part owner for negligence of the master. The decree went against both, but the only thing argued and decided was the question of jurisdiction, whether the tort was maritime; the master was of course liable on the merits because the negligence was his own; the co-owner, it would seem, under the rules above laid down, was not liable. This question, however, was not taken, and the decree was against both.

In actions by seamen against the owners for injuries received in the service of the vessel, we find a liability wholly different from that of the common law, more just, and in conformity with the rule laid down by Judge Story in *The Marianna Flora*. In this class of cases the seaman is entitled to his maintenance, cure, and wages to the end of the voyage, whether the servants of the owner were negligent or not, and whether the seaman was negligent or not, but not to *damages* unless his injury arose from the unseaworthiness of the ship, or from a failure of the owners to supply and keep in order the proper appliances of the ship. That is to say, the negligence of the owners themselves must be shown in order to warrant a judgment for damages; that they were privy to the negligence causing the injury.³

Thus we find that in most actions *in personam ex delicto* "privity" of the owners is the catchword, just as in actions *in rem* "the

¹ It must be recognized, of course, that in cases by seamen or passengers against the owners of the vessel on which they were, the liability is *quasi ex contractu* and not strictly *respondeat superior*; that this is also the ground of liability in cases of owners or ship's company of a tow against the owners of the tug doing the towing; that in cases of damage brought by ship-owner against dock-owner the liability is also *quasi ex contractu*; that in cases of marine nuisance the ground of liability is *sic utere tuo ut alienum non laedas*, not *respondeat superior*; that in cases of death the liability in admiralty is wholly statutory (*The Harrisburg*, 119 U. S. 199) and that cases where recovery was not had are cases of *non-respondeat superior* and not of *respondeat superior*.

² 105 U. S. 626.

³ *The Osceola*, 189 U. S. 158. This doctrine of maintenance and cure was sanctioned in the exercise of a conscientious discretion even as applied to a stevedore in an action *ex delicto*, by the Supreme Court in *The Max Morris*, 137 U. S. 1, 13.

offending thing" is the catchword. If the owner is privy to the negligence, it is his own negligence for which he is liable, not the negligence of his servant. He is liable not on the ground of *respondeat superior*, but because he is negligent himself. For instance, it has been held that though his ship is liable for the negligence of a pilot taken by compulsion of law, the ship-owner is *not* liable *in personam* because there is no privity.¹ If liable at all *in personam* for negligence to which he is not privy, and as we have seen he is in some cases of collision, he can limit his liability to his interest in the ship and freight, and is liable only in the exercise by the court of a conscientious discretion and upon enlarged principles of justice, and not on the ground of *respondeat superior*.

He is not liable, as a general rule, *in personam ex delicto* for damage occurring through faults of the master and crew in the management of the ship, to which he is in no way privy.²

Even in actions arising *ex contractu* this liability of the ship-owner for negligence of the master and crew in the management of the ship, formerly existing, has been done away with by the Harter Act,³ so far as the contract of carriage is concerned, and it never existed in cases of seamen, as shown above, nor in actions *ex delicto*, excepting in some collision cases, and even in them the ground of the liability is not *respondeat superior*.

We see, then, that the liability in the admiralty for negligence *ex delicto* rests upon grounds entirely distinct and apart from *respondeat superior*, and if this liability is put upon the ground of *respondeat superior*, it naturally leads to much misconception, and the introduction into the admiralty of undesirable and technical doctrines belonging to the common law, such, for instance, as the doctrine of fellow servant wholly transplanted and at variance with the giving or withholding of damages upon enlarged principles of justice and equity according to the rule laid down by Judge Story in *The Marianna Flora*, a doctrine which has not stood the test of public opinion, and was modified by Lord Campbell's Act in England, and, since then by acts passed by the legislatures of almost every state in the Union, but which unfortunately is being applied to-day by the lower admiralty courts of the United States all over

¹ *The China*, 7 Wall. (U. S.) 53; *Crisp v. U. S., etc.*, S. S. Co., 124 Fed. Rep. 748, 749; *Ralli v. Troop*, *supra*, at 423, 424.

² *Crisp v. U. S., etc.*, S. S. Co., *supra*.

³ 27 U. S. Stats. at Large 445.

the country, though it has not yet had the sanction of a decision by the Supreme Court of the United States.¹

It is to be hoped that it will not receive this sanction for the sake of the purity and uniformity of the maritime law and its just and effective administration, for the admiralty rules applied as they are by the court with a conscientious discretion and upon enlarged principles of justice and equity certainly seem preferable to the unjust rule of *respondeat superior* as limited and restricted by the technical rules of the common law courts.

Then, too, it will be observed that if *respondeat superior* is admitted into the admiralty, while at the same time the compensating defense of contributory negligence is excluded, as it has been since *The Max Morris*,² the result will be that the liability of the owner for the negligence of his servants will be carried in the admiralty much further than it has been at common law, and this is not desirable, as shown in the beginning of this article. It may be true that the doctrine of the offending thing is quite as unjust as *respondeat superior*; perhaps it is more so, but the introduction of *respondeat superior* will not mitigate the harshness of that doctrine, but will only increase the liability of the owner *in personam*, and at the same time tend to breed misconception and confuse the fundamental principles of the admiralty jurisprudence.

It must not be forgotten that in the admiralty the injustice and harshness of the doctrine of "the offending thing" is counterbalanced by limiting the liability of the owner to his interest in the thing: the introduction of some common law doctrines and the exclusion of others will disturb the whole balance of the maritime jurisprudence, which had, it would seem, been nicely adjusted by the general sense of the commercial world during a number of centuries, and tend to destroy that uniformity of the general maritime law, which is so important in commercial affairs.³

Frederic Cunningham.

February 20, 1906.

¹ See article in 18 HARV. L. REV. 294, where the modern application of *respondeat superior* in the lower courts is abundantly shown.

² 137 U. S. 1.

³ Mr. Justice White in delivering the opinion of the court in *Workman v. New York City, etc.*, 179 U. S. 552, says, at page 565, "That under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule *respondeat superior* is elementary," and cites *Thorpe v. Hammond*, 12 Wall. (U. S.) 408, and *The Plymouth*, 3 Wall. (U. S.) 35. At page 573 the learned justice says: "A recovery can be had *in personam*, however, for

a maritime tort when the relation existing between the owner and the master and crew of the vessel at the time of the negligent collision, was that of master and servant," and cites the same two cases.

The last statement seems to be a correct and accurate statement of the law, and was all that was necessary for the decision of that case. The first seems objectionable, because it includes cases other than collision, and so far as it does so is only a *dictum*, because the case was one of collision and it rests the liability upon *respondeat superior*, which seems, as shown above, to be a mistake. The cases cited do not support the proposition for which they are cited: the first being a case of the owner's own negligence, and the second being decided wholly on the question of jurisdiction and dismissed because the tort was not maritime. It seems likely that the second statement was what the learned justice intended to express when he wrote the first. Certainly the first statement cannot be reconciled with Judge Swayne's statement as to the position and powers of the master under the general maritime law quoted above from the case of *The China*, a well-considered and leading and often cited case by the Supreme Court upon this subject.

There are some interesting remarks bearing upon this subject in the February number of the *Law Magazine and Review*, at pp. 209-211, discussing the recent Liverpool Conference of the International Law Association, and showing the diversity of the laws of the different countries in this respect, from which it would appear that the rules of the American admiralty law as expounded up to date by the Supreme Court of the United States are a just and moderate mean, in regard to the liability of ship-owners in actions *ex delicto*.

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THE COAL ROADS DECISION. — It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without discrimination. Enforcement of all branches of this law is necessary at all times; but the commercial community is most interested to-day in the prevention of personal discrimination. It is established now, past all qualification, that it is the duty of the common carrier to serve all alike who ask the same service, so that all shippers from a given point may compete with each other in distant markets upon equal terms. For it is now recognized that the slightest differences in the rate may result in the long run in building up one concern and in ruining its rival.

This public condemnation of personal discrimination must have influenced the judges in coming to the striking decision handed down a few weeks ago by the United States Supreme Court. *New York, New Haven, and Hartford Railroad et al. v. Interstate Commerce Commission*, U. S. Sup. Ct., Feb. 19, 1906. The complaint in that case was filed by the Attorney-General under the provisions of the Interstate Commerce Act which forbid personal discrimination, charging that traffic was being moved at less than the published rates. It was shown that the Chesapeake and Ohio Railroad had sold to the New York, New Haven, and Hartford Railroad sixty

thousand tons of coal to be delivered to the buyer at \$2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate \$2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was \$1.45 per ton. Upon these facts the United States Supreme Court decided that there was in effect the evil of personal discrimination against other shippers in this arrangement; and the final decree therefore was that the Chesapeake and Ohio was perpetually enjoined from taking less than its published tariff of freight rates, by means of dealing in the purchase and sale of coal.

The paramount duty of the common carrier is to the public; it must do nothing inconsistent with that obligation; and to carry its own goods at lower rates than it carries those of the shipping public will enable it to market those goods at lower prices than other shippers can make. Indeed it was a fact shown in the record of this case that the Chesapeake and Ohio, as a result of its being a dealer in coal as well as a carrier, had become virtually the sole purchaser and seller of all coal produced along its line of road. As the court points out, the inevitable tendency will be toward such monopoly if the common carrier is permitted both to deal in a commodity and to carry it. As a carrier may reduce or entirely eliminate the profit upon transportation to market in making its calculations as to the margin of profit that it will require in buying and selling the commodity, the result must be that no other person can compete on equal terms with the carrier in his capacity as dealer. The court is content, it seems, to decide no more at present than that the carrier must charge itself in its operations as a dealer with its own schedule rates as carrier; but much of its reasoning, if carried to the logical conclusion, would forbid the railroads to take the inconsistent positions of dealers and carriers. And indeed it seems that the possibilities of evil cannot be eradicated unless the common carrier is forbidden altogether to deal in the commodities which it transports.¹

B. W.

EFFECT OF ESTOPPEL UPON A CONTRACT VOID FOR USURY. — Much of the conflict as to the effect of usury upon a contract is unquestionably due to the differences in the usury statutes in the various jurisdictions. But this will not account for the many irreconcilable decisions in a single state, — in New York, for example, where, in spite of a very explicit statute declaring usurious contracts altogether void,¹ the authorities seem hopelessly at odds. It is believed that the differences in judicial opinion on such an apparently simple point are due to a failure by many courts to distinguish between situations where it is proper to apply the doctrine of equitable estoppel and where it is not. A recent New York case has held that in an action on a note void under the usury statute, the maker may be estopped to set up his defense of usury. *Hungerford Co. v. Brigham*, 95 N. Y. Supp. 867. This

¹ This radical principle may be found expressed in *Attorney-General v. Great Northern Ry.*, 29 L. J. Ch. 794, and in *Hannah v. People*, 198 Ill. 77.

¹ 1 Rev. Stats. 772, § 5; as amended, Laws 1837, c. 430, § 1.

decision, in holding that a thing absolutely void may be made valid by estoppel, seems to violate the sound principle that the law should override the conduct of parties, and not the conduct of parties, the law.² Although the decision finds support in New York³ and elsewhere,⁴ in closely analogous classes of cases the law is well settled otherwise. For instance, contracts void as against public policy cannot become enforceable by estoppel,⁵ nor can a married woman, by asserting that she is unmarried, be estopped to show her coverture,⁶ nor an infant his infancy.⁷ So one representing a contract not to be within the Statute of Frauds is not estopped.⁸ The reason given by the courts for the distinction between usurious contracts and other void contracts — that if the estoppel is not allowed, the party for whose protection the statute was passed may find it a sword against him — is precisely as applicable to other classes of void contracts as to which the law is settled beyond dispute.

We might conceivably, however, shut our eyes to the technical impropriety of the present decision if in no other way could the deserving plaintiff recover adequate damages, on the ground that, after all, the common law court, in allowing an estoppel at all, is using this equitable device to work out a just result. But we are saved the necessity for this departure from logic, for the plaintiff, even if he fails on the usurious obligation, has several courses open to him. First, a usurious note is often given, as in the principal case, as security for, or payment of, an antecedent indebtedness, and if the law should declare the note unenforceable, it would forthwith revive the old claim.⁹ Or if the note were taken for present value, there would be a quasi-contractual recovery of the amount given.¹⁰ Further, in almost any case where, because of a controlling rule of law, the estoppel could not be set up, the courts would strain the language or conduct relied upon as a misrepresentation in order to give an action of deceit against the fraudulent person. As a general rule, then, there seems no good reason for allowing an estoppel to make valid a void contract. To this rule there is only one well-recognized exception. If a contract may be entered into either innocently or in a way that according to a statute will vitiate the resulting contract, an estoppel may be raised against one who, though in fact using the improper way, has represented that he used the other.¹¹

Some courts would support the present decision by asserting that the statute, though saying "void," really means "voidable at the election of the defrauded party." This may, in many cases, be a proper construction of the statute;¹² but where the statute is as clear and unequivocal as the one upon which the present case turns, the legislature and not the courts should give the remedy.

² *National Granite Bank v. Tyndale*, 176 Mass. 547.

³ *Payne v. Burnham*, 62 N. Y. 69; but *cf. Veeder v. Mudgett*, 95 N. Y. 295, 310, 311.

⁴ *Henry v. McAllister*, 99 Ga. 557; *contra*, *Chamberlain v. M'Clurg*, 8 Watts & S. (Pa.) 31.

⁵ *Langan v. Sankey*, 55 Ia. 52; *Brown v. First Nat. Bank*, 137 Ind. 655.

⁶ *Lowell v. Daniels*, 2 Gray (Mass.) 161; *Solomon v. Garland*, 2 Mackey (D. C.) 113.

⁷ *Sims v. Everhardt*, 102 U. S. 300. And see 11 HARV. L. REV. 199.

⁸ *Brightman v. Hicks*, 108 Mass. 246.

⁹ *Pollard v. Scholy*, Cro. Eliz. pt. i. p. 20.

¹⁰ *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138.

¹¹ *Veeder v. Mudgett*, 95 N. Y. 295; *Mutual Life Ins. Co. v. Corey*, 135 N. Y. 326; *Smith v. Weeks*, 65 Vt. 566.

¹² *Cf. Ewell v. Daggs*, 108 U. S. 143.

POSITION OF DISCLOSED PRINCIPAL UNDER WRITTEN CONTRACT MADE BY HIS AGENT.—The determination of a disclosed principal's position under simple written contracts purporting to be made by the agent personally, has given rise to conflicting views.¹ Of course, even though the contract appears to be the agent's, if from its face there may be gathered an intention that the agent shall not be bound, he is not liable. Such, in a recent English case, was found to be the fact. *Morley v. Makin*, 22 T. L. R. 7 (K. B. Div.). But where, *prima facie*, the agent appears to be personally contracting, the accepted English law is that the third person has his option to sue either the agent or the disclosed principal, and the latter may enforce the contract as his own.² In this country there is no holding on the agent's liability, and what little square authority is to be found on the principal's position is conflicting. This permits an examination of the question on principle.³ A careless assimilation is often made of the case of disclosed principal to the doctrine of undisclosed principal.⁴ The latter, of course, cannot be explained on any theory of contract. It is a distinct principle of the law of agency, founded on the practical identification from a business view of principal with agent. But when the principal's name is disclosed, a different situation arises. Only one contract is in fact made. Here the law of agency makes no peculiar demands, and the law of contracts should control in creating but a single liability.

This is so where the agreement is oral; but in case of written contracts the "parol evidence rule" asserts itself. This is really not a rule of evidence at all, but embodies rules of substantive law.⁵ As applied to contracts, it means that a writing expressing the terms of the contract is deemed the conclusive expression of intention of the parties. If, then, this rule have any vitality, the English doctrine is a clear infringement. The disclosed principal's liability has been defended on two grounds overlapping each other somewhat. It is suggested, on the one hand, that the principal may use any signature he pleases, and therefore the signature of the agent is really the principal's. This is a bald *non sequitur*. Of course the principal may use the agent's name as his business name, and when he does so he is liable.⁶ Further, if the agent's name is the disclosed principal's, the English doctrine giving an optional right against agent or principal is indefensible. The second argument is, that to show that the principal was in fact meant and not the agent is not varying the instrument, but only explaining it.⁷ This is ingenious, but contrary to fact. If X does business in his own name, and a contract is made by A, his agent, A cannot truthfully be identified as other than A. (If an omitted party may be introduced, why not an omitted term of the contract?) As far, then, as an action on the contract is concerned, the presumption of election to hold the agent should be conclusive. If, however, the parties intended that the principal be liable and have simply

¹ The authorities are collected in Wambaugh, Cases on Agency 548-582; see also *Barbre v. Goodale*, 28 Ore. 465; *Ferguson v. McBean*, 91 Cal. 63.

² *Higgins v. Senior*, 8 M. & W. 834; *Calder v. Dobell*, L. R. 6 C. P. 486; see also 2 Smith's Lead. Cas., 11th Eng. ed., 413 ff.

³ The rule as stated by American text-writers accords with the English doctrine. Story, Agency § 160, a; Clark & Skyles, Agency 758.

⁴ See *Byington v. Simpson*, 134 Mass. 169.

⁵ Thayer, Prel. Treat. Ev. 397 *et seq.*

⁶ *Trueman v. Loder*, 11 Ad. & E. 589. This is also the case in the suggested analogy of a dormant partner represented by the ostensible partner's name.

⁷ This line of reasoning is equally applicable to sealed instruments, yet no one thinks of applying it.

failed to express their intention perfectly, an erroneous legal liability has been created through mutual mistake. The case therefore is a proper subject for reformation and rescission.⁸ Here the use to which parol evidence is put is legitimate — equitable relief based on mutual mistake. The situation is analogous to the cases where a sealed instrument is signed by one partner under mistaken belief that all are thereby bound. Equity will give effect to this intention by reforming the instrument.⁹ In a bill for equitable relief, however, stronger proof of the alleged intent of the parties is required than in an action on the contract.¹⁰

VALIDITY OF TRUST PERFORMABLE OUTSIDE OF JURISDICTION OF ITS CREATION. — Where a testamentary trust is created in one state to be administered in a foreign state, an interesting question at once arises as to which law is to determine the validity of the trust. In the case of realty it would seem that the *lex rei sitae* must govern as in all other cases involving the creation of an interest in land.¹ In a trust of personalty, the validity of the bequest should be determined by the law of the testator's domicile. Thus, where a gift of personalty to a foreign corporation to be invested in land is valid by the *lex domicilii* of the testator, it is not affected by the statute of mortmain of the state of administration.² The executor may receive the bequest in the former state; the latter state does not forbid the investment of the money in land. So a testamentary trust, good by the law of the state of its creation, is not invalidated by the fact that in the state where administration is to occur such a trust would be bad for indefiniteness of object.³ And the result is similar where the trust contravenes the rule against perpetuities of the latter state.⁴ Where, however, the trust is too remote by the *lex domicilii* of the testator, it is said that it is not against the policy of that law to allow the creation of a perpetuity abroad, and that therefore the trust is valid if not opposed to the law of the state of administration; and the same may be said as to a trust contrary to the mortmain statutes of the testator's domicile.⁵ This result seems based on the assumption that the *lex domicilii* of the testator allows the validity of such a trust to be determined by the foreign law. Where, therefore, the limitation is too remote by both laws, it must certainly be void.

Where an equitable conversion occurs, the question is more intricate. A devise of land on trusts which are invalid by the *lex rei sitae* but accompanied by a direction to sell and invest the proceeds on trusts which are

⁸ See *Wake v. Harrop*, 6 H. & N. 768.

⁹ See *McNaughten v. Partridge*, 11 Oh. St. 223; 2 Ames, Cas. Eq. Jur. 220, n. 2. When the Statute of Frauds requires a writing, reformation in conformity with the oral bargain could probably not be obtained under the prevailing English doctrine. See 2 Ames, Cas. Eq. Jur. 299, n. 2.

¹⁰ See *Hough v. Smith*, 132 Ala. 204; 2 Ames, Cas. Eq. Jur. 312, n. 2.

¹ *Acker v. Priest*, 92 Ia. 610.

² *Canterbury v. Wyburn*, [1895] A. C. 89.

³ *Handley v. Palmer*, 91 Fed. Rep. 948; *Fellows v. Miner*, 119 Mass. 541; and see *Jones v. Habersham*, 107 U. S. 174.

⁴ *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Dammert v. Osborn*, 140 N. Y. 30.

⁵ *Hope v. Brewer*, 136 N. Y. 126; *Vansant v. Roberts*, 3 Md. 119; and see *Gray, Rule against Perpetuities*, 2d ed., 266.

valid by the law of the place of administration, has been held invalid.⁶ But the view now generally prevailing in this country seems to be that such a devise is valid, if immediate and absolute conversion of the property is directed;⁷ otherwise not.⁸ This seems the more satisfactory result, as it is but another application of the doctrine that the holding of property in a foreign state on remote limitations is not opposed to the law of the domestic state. So a devise of land in Italy to a trustee to sell and invest the proceeds in English land was held valid, even though by the Italian law land could not be held in trust.⁹ The result of this case seems questionable in view of the absolute prohibition of all trusts in land by the Italian law, though it may possibly be supported on the theory that a trust obligation, unaffected by Italian law, attaches to the proceeds of the land when sold under the terms of the will. The converse of this, involving the conversion of personalty into realty, is suggested by a recent decision of the New York Court of Appeals. *Mount v. Tuttle*, 34 N. Y. L. J. 1375 (N. Y., Ct. App., Jan., 1906). A bequest of personalty on trust to be converted into realty in Utah was held void under the law of Utah for indefiniteness of object, though by the *lex domicilii* of the testator it would have been valid. The result seems right, since land in Utah certainly could not be held on trusts which were illegal in that state.¹⁰

LIMITATION OF ACTION FOR DEATH BY WRONGFUL ACT. — The stipulation in the statutes giving a right of action for death by wrongful act that action must be brought or notice of claim given within a certain time, is not a mere special statute of limitations affecting the remedy only, but is a substantial condition qualifying the right.¹ As regards the question of when the period begins to run, however, all such stipulations may be included in the general terms "limitations" and "statutes of limitations." The solution of this question is dependent upon the form of the statute involved. Where the statute is so worded as to effect merely a survival of the decedent's tort action for the injury, the limitation must run uninterruptedly from the time of the injury.² But the great majority of statutes create an entirely new cause of action.³ In some instances this new cause of action is given to the widow or children, in which case it seems clear that the limitation must run from the time of the death.⁴ But where the personal representative alone is given a right of action, and the statute provides that a certain limitation shall begin to run on the accrual of the cause of action, there is some conflict in the decisions. The New York Court of Appeals recently held, by a divided court, that the limitation begins to run, not at the death of an intestate, but

⁶ *Freke v. Carbery*, L. R. 16 Eq. 461.

⁷ *Hope v. Brewer*, *supra*; *Ford v. Ford*, 80 Mich. 42.

⁸ *Hobson v. Hale*, 95 N. Y. 588.

⁹ *In re Piercy*, [1895] 1 Ch. 83.

¹⁰ *White v. Howard*, 46 N. Y. 144.

¹ *Dailey v. New York, etc., Ry. Co.*, 26 N. Y. Misc. 539; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. Rep. 996.

² *Sachs v. City of Sioux City*, 109 Ia. 224; *cf. Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294, 306.

³ *Pittsburgh, etc., Ry. Co. v. Hosea*, 152 Ind. 412; see 15 HARV. L. REV. 854.

⁴ *Western, etc., R. R. Co. v. Bass*, 104 Ga. 390.

at the appointment of his administrator. *Crafo v. The City of Syracuse*, 76 N. E. Rep. 465.

The dissenting opinion rests largely upon the position that it is undesirable and against the policy of all statutes of limitations to leave it in the power of the next of kin to postpone the suit indefinitely by delaying to have an administrator appointed. This argument has added force in that the next of kin, as designated by the statute, are the real beneficiaries of the suit, and it seems equitable that the suit by the administrator, practically a mere trustee, should be barred by the laches of the *cestuis*. This view has generally been adopted by legislatures, for by far the greater number of statutes provide that the suit shall be barred in a certain period after the death.⁵ But can this result be reached when the statute provides that the limitation shall run from the accrual of the action? It has been reached, on the ground that the legislature must have intended the same result in both cases.⁶ But it is hard to see how the words of the statute can fairly be construed so as to give this result. The cause of action must accrue to the personal representative, since he alone is authorized to sue, and so how can there be any accrual of the cause of action until his appointment? Moreover, though a cause of action may exist in some one who is for the time unable to enforce it, there can be no conception of a cause of action that does not exist as a right of some person.⁷ Thus, it seems, the reason that unity of ownership of dominant and servient tenements extinguishes the easement, is that, as no man is able to have a right against himself, so there is no person to whom the right may adhere, and the right cannot exist unattached.⁸ This conclusion is supported⁹ by the analogy of the case where a trespass is committed against the estate of the deceased, when it is held that the statute of limitations does not begin to run until the appointment of the administrator.⁹

ANTENUPTIAL FRAUDS ON THE MARITAL RIGHTS OF A FUTURE SPOUSE. — The doctrine is now well settled in the United States that equity will aid either spouse to establish his or her marital rights in property voluntarily and secretly conveyed away by the other, before marriage and after betrothal, with an intent to defeat such rights. In England this protection is given only to the husband, but the American doctrine, which vouchsafes equal rights to both spouses, seems not only right upon principle, but more in accord with modern ideas of justice.¹ The Supreme Court of Illinois recently held that equity would give a wife dower and homestead in land voluntarily conveyed by her husband, by a deed not recorded until after marriage, even though at the time of conveyance he had never met the complainant, since the deed was made with a general intent to defeat the

⁵ *County v. Pacific, etc., Co.*, 68 N. J. Law 273; *George v. Chicago, etc., Ry. Co.*, 51 Wis. 603; *Lake Shore, etc., Ry. Co. v. Dylinski*, 67 Ill. App. 114; *Taylor v. Cranberry, etc., Co.*, 94 N. C. 525. Some statutes expressly make the limitation on the new cause of action run from the time of the injury. *Rugland v. Anderson*, 30 Minn. 386.

⁶ *Carden v. L. & N. R. R.*, 101 Ky. 113.

⁷ *Sherman v. Western Stage Co.*, 24 Ia. 515.

⁸ *Andrews v. Hartford, etc., R. Co.*, 34 Conn. 57; *Barnes v. City of Brooklyn*, 22 N. Y. App. Div. 520.

⁹ *Bucklin v. Ford*, 5 Barb. (N. Y.) 393.

¹ *Chandler v. Hollingsworth*, 3 Del. Ch. 99.

marital rights of any person he might thereafter marry. *Higgins v. Higgins*, 76 N. E. Rep. 86. The court decided that, as a conveyance made with a general intent to defraud future creditors may be avoided by them, the wife, being in an analogous position, may also have relief.

At what time such a conveyance must be made in order that relief will be given is a question on which there are conflicting views. Some courts hold that there must be clear proof of an existing engagement at the time the conveyance is made;² others that relief will be given if the conveyance is made during the intimate relationship of courtship.³ It is interesting to note that in the latter cases the conveyance was made pending negotiations for property settlements.⁴ No court or text writer seems to have intimated that a conveyance will be impeached unless there be fraud intended upon some particular person, though one judge carefully refused to express an opinion until the question should arise for decision.⁵

Betrothal creates a status,⁶ and the reason for interference is that there is a fraud on this status.⁷ The true ground for the relief is not the disappointment of an expectation, but fraud on a legal right, — that is, the right to a marriage without any secret alteration of the circumstances as they stood at the time of betrothal, — and therefore knowledge at the time of entering the relation as to the amount of the other's property is immaterial.⁸ It would accordingly seem that the right to relief flows directly from the betrothal, and no alienation made before that can be complained of. A line must be drawn somewhere, and to go back into the period before betrothal, and even before acquaintance, seems to require a needless solicitude for the protection of the wife at the expense of innocent donees.

If, then, in the principal case there are no equitable rights founded on fraud, neither are there any legal rights founded on the fact that the deed was unrecorded until after marriage.⁹ Even under a statute holding unrecorded deeds good only against the grantor and his heirs, it is held that the wife's rights are served only out of the seisin of the husband during coverture, and that the unrecorded deed divested him of that.¹⁰ Therefore it would seem that the doctrine of the principal case is unsound from any common law standpoint; and it is very doubtful if it can be sustained even under a narrow construction of the Illinois statute against conveyances in fraud of "creditors or other persons."

CONSTITUTIONALITY OF THE NEW YORK STOCK TRANSFER STAMP TAX. — The impossibility of devising a system of taxation that shall distribute the burdens of government equitably, and the expediency of leaving a large discretion to the legislatures, have moved the courts to construe narrowly section one of the Fourteenth Amendment, and similar sections of the state constitutions. The line beyond which the legislature cannot go is

² *Gregory v. Winston*, 23 Gratt. (Va.) 102.

³ See 2 Bishop, *Law of Married Women* § 342.

⁴ See cases cited by Bishop, *supra*.

⁵ See *Goddard v. Snow*, 1 Russ. 485.

⁶ See *Frost v. Knight*, L. R. 7 Exch. 111.

⁷ See 14 HARV. L. REV. 452.

⁸ *Chandler v. Hollingsworth*, *supra*.

⁹ *Richardson v. Skofield*, 45 Me. 386.

¹⁰ *Blood v. Blood*, 23 Pick. (Mass.) 80.

incapable of definition, and can be discovered only by an examination of the cases and by the use of a sound judicial common sense. The most important principle to be observed, and one that is too rarely emphasized, is that the justice of a tax is a purely relative matter. To exact from the watchmakers the total revenue of the state would be such an arbitrary extortion as to be unconstitutional beyond all doubt. But if all other members of the state are paying reasonably fair taxes, the watchmakers cannot object because a special tax is laid upon them which may perhaps be slightly overburdensome. A recent New York case¹ upholding the constitutionality of the stock transfer stamp tax which imposed a tax of two cents for every transfer of a share of stock of the par value of one hundred dollars, calls for an application of this principle. *People ex rel. Hatch v. Reardon*, 34 N. Y. L. J. 1457 (App. Div., Jan. 1906). In the first place, the validity of the statute was attacked upon the ground that the owner of a one hundred dollar share worth ten dollars is taxed as much on each sale as the owner of a share worth five hundred. Undoubtedly this provision works unfairly in that it throws the burden on those who are least able to sustain it. But as some rule of thumb to ascertain the amount of the tax in each case was necessary for the practical operation of the law, and as this provision worked but slight injustice, if any, in the vast majority of cases, it is reasonable. Such slight inequalities, whenever they have been brought to the attention of the courts, have been sustained.² In the second place, the fact that approximately six million dollars, or nearly one-quarter of the entire state tax levy, is being exacted from this special class of persons by this tax renders its validity at least questionable. The courts are not, however, justified in annulling such a statute unless its discrimination is clear and excessive.³ If the legislature were to discontinue all other methods of raising a revenue, and by increasing the amount of this tax to obtain therefrom a sufficient sum to cover all expenses, the tax would certainly be unconstitutional. In this case, however, only a part of the revenues of the state are derived from this source; and as a large amount of capital is invested in the business of buying and selling stocks, the classification of these sales together for purposes of taxation is reasonable, and the imposition of a large tax is within the discretion of the legislature. The cases upholding taxes upon express companies that do not own their means of transportation,⁴ upon agents of unincorporated insurance companies,⁵ and upon the obligations of corporations⁶ illustrate the large discretion that is vested in the legislature in classifying the subjects of taxation and imposing burdensome taxes upon the various classes. Statutes have been overruled only when they have created entirely unreasonable classes. For instance, a tax upon those whose remainders vested prior to 1885 and who shall come into possession of their estate after the passage of the act,⁷ or upon those who have not paid a previous tax,⁸ have been held unconstitutional.

¹ See *Thomas v. U. S.*, 192 U. S. 363, sustaining a similar federal statute which was attacked merely on the ground that it was a direct tax and had not been properly apportioned as such.

² *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232. See also *Nicol v. Ames*, 173 U. S. 509.

³ See *Magoun v. Illinois, etc., Bank*, 170 U. S. 283, 293.

⁴ *Pacific Express Co. v. Seibert*, 142 U. S. 339.

⁵ *Fire Dep't, etc., of New York v. Stanton*, 159 N. Y. 225.

⁶ *Bell's Gap R. R. Co. v. Pennsylvania*, *supra*.

⁷ *Matter of Pell*, 171 N. Y. 48.

⁸ *State, etc., Relators v. Township, etc., of Hunterdon*, 36 N. J. Law 66.

IMPOSSIBILITY AS A DEFENSE TO THE PERFORMANCE OF A CONTRACT.—The title of "Impossibility" to designate a class of defenses for the non-performance of contracts, though custom has now made its use mandatory, is a most unfortunate one, for there never has been a time in the history of the common law when the simple impossibility of performing a contract excused the promisor from liability thereunder;¹ while, on the other hand, by far the greater number of cases collected under this head are not cases of actual impossibility at all. What, therefore, the title really indicates is that there are some instances in which a party will be excused from carrying out his promise because it has become more difficult for him to do so than it was at the time the promise was made.

These instances in the early common law were few, because the courts took the position that a party could have provided against such contingencies by the terms of his contract.² In the course of time, however, they have greatly increased in number, and are now usually collected under the three general heads of impossibility created by domestic law, by destruction of the subject-matter of the contract, and by sickness, insanity, or death of a party to a contract of personal services.³ The reason universally assigned by the courts for excusing performance in these cases is that the proper interpretation of the contract shows that the parties did not intend to be bound on the happening of the excusing contingency. Thus, in the very instances where the promisor was formerly held liable for not providing against the event by his contract, he is now excused because of an implied condition in his favor in that same contract. The old rule was logical, though it often worked great injustice; the new rule is made to bring about a desirable result, but is based on entirely untenable premises, for it seems clear that the doctrine of implied intention is a pure fiction. Sir Frederick Pollock has said that any evidence of intention is so seldom forthcoming in these cases that the court relies on its own view of what the parties ought to have intended.⁴ The simple truth of the matter is that the cases show that these defenses are allowed on the equitable ground that conditions have so changed between the time of contracting and the time for performance that it would be unjust to compel performance.⁵ This is also shown by the fact that the defense must be set up affirmatively, and that, if the so-called impossibility could have been foreseen, it is no excuse.⁶

The equitable nature of this defense is further emphasized by the comparatively recent extension of it to cases where, not the subject-matter of the contract, but the means of performing it has been destroyed,⁷ and, also, to cases where performance of a contract for personal services has become dangerous to life or health. An illustration of the latter extension is found in a late case where an English sailor was held justified in leaving his

¹ Y. B. 22 Edw. IV., pl. 26; *Reid v. Alaska Packing Co.*, 43 Ore. 429.

² *Paradine v. Jane*, Al. 26.

³ See Anson on Contracts, 10th ed., 342.

⁴ Wald's Pollock on Contracts, 3d ed., 519.

⁵ *Clarksville Land Co. v. Harriman*, 68 N. H. 374. To be accurate, it should be said that there are two distinct classes of cases in which difficulty imposed by law is held to be a defense. If the very act which the promisor agreed to perform is declared illegal, the ground of the defense is public policy. *Cordes v. Miller*, 39 Mich. 581. But if, as is commonly the case, the statute simply makes the performance of a perfectly legal act impossible or difficult, the defense rests on the same equitable basis as in the other two general classes. *Bailey v. De Crespigny*, L. R. 4 Q. B. 180.

⁶ *Jennings v. Lyons*, 39 Wis. 553.

⁷ *Buffalo, etc., Land Co. v. Bellevue, etc., Co.*, 165 N. Y. 247.

ship upon learning that it was laden with contraband of war. *Sibbery v. Connelly*, 22 T. L. R. 174 (K. B. D. Dec. 18, 1905). This was no case of actual impossibility, nor can any implied intention be found; but conditions had totally changed since making the contract, and a reasonable man would have been justified in declining to assume the increased risk.⁸

RECENT CASES.

ADVERSE POSSESSION—WHO MAY GAIN TITLE—POSSESSION UNDER CLAIM OF RIGHT AGAINST ALL BUT SOVEREIGN.—Public land was granted to a railroad company under which the defendant claims as grantee. Subsequently the plaintiff entered upon the land, intending to acquire title from the government under the Timber Culture Act. He remained in possession until the statute of limitations had run, and then brought an action to quiet his title. *Held*, that to constitute adverse possession a claim of right against all but the government is sufficient, and the plaintiff's title is therefore good. *Blumer v. Iowa Land Co.*, 105 N. W. Rep. 342 (Ia.).

For a discussion of the principles involved, see 18 HARV. L. REV. 380.

AGENCY—DISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES UNDER AGENT'S CONTRACTS WITH THIRD PERSONS.—A document signed by the defendants stated that as deacons of a church they invited the plaintiff to the pastorate at a specified salary. "We regret to state that our present income will not warrant anything higher now, but," etc. The plaintiff, upon acceptance, acted as treasurer, and out of the surplus of funds on hand paid himself his salary. *Held*, that, as on the face of the contract the plaintiff had pointed out to him the fund out of which he was to be paid, the defendants are not personally liable. *Morley v. Makin*, 22 T. L. R. 7 (Eng., K. B. D., Oct. 26, 1905). See NOTES, p. 456.

ANIMALS—DAMAGE TO PERSONS BY ANIMALS—WHAT AMOUNTS TO KEEPING AND HARBORING A DOG.—The plaintiff, who was bitten by a vicious dog at large upon the street, brought action against the defendant. The defendant was not the owner of the dog, but permitted her porter, who worked upon her premises, to keep it thereon, both having knowledge of its vicious propensities. The jury found for the plaintiff. *Held*, that the question whether the defendant kept or harbored the dog was properly submitted to the jury, and that the verdict will not be disturbed. *Barklow v. Avery*, 89 S. W. Rep. 417 (Tex., Civ. App.).

Even at common law one who keeps or harbors a vicious dog, knowing its vicious propensities, seems to be responsible for its actions, although he is not the owner. *M'Kone v. Wood*, 5 C. & P. 1; *Bundschuh v. Mayer*, 81 Hun (N. Y.) 111. But now this liability is quite generally imposed or defined by statute. Yet precisely what constitutes "keeping or harboring" has been usually left to the courts to define. In a few cases the language used by the court would sustain the rule that merely to permit the dog to remain upon the premises constitutes a "harboring." *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560. But the better and generally accepted rule seems to be that the question is one of fact for the jury, who are to decide it in the light of all the evidence. *Whittemore v. Thomas*, 153 Mass. 347. And the test usually given them is that the dog must have been in the possession or control of the defendant as a domestic animal. *Cummings v. Riley*, 52 N. H. 368. Or, if kept by servants or agents, the dog must be kept in some sense for the defendant's benefit. *Baker v. Kinsey*, 38 Cal. 631; *Collingill v. City of Haverhill*, 128 Mass. 218.

⁸ See *Walsh v. Fisher*, 102 Wis. 172, 179.

BANKS AND BANKING — COLLECTIONS — CHECK SENT TO DRAWEE BANK FOR COLLECTION. — The plaintiffs deposited a check with the defendant bank for collection, and the latter forwarded it in accordance with the usual custom of the locality to the drawee bank. In payment, the latter sent New York exchange, which owing to its subsequent insolvency was not honored. *Held*, that the custom is unreasonable and will not relieve the defendant from liability for any damages resulting from its action. *Farley National Bank v. Pollock & Bernheimer*, 39 So. Rep. 612 (Ala.).

Whether the collecting bank is regarded as an agent, or, according to a sounder view, as a trustee of the claims against the debtor for the benefit of the depository bank, the Alabama decision is clearly right. Under either relation, one of the depository bank's duties to the depositor is to select its correspondent with due care. *German Nat. Bank v. Burns*, 12 Col. 539. Though the drawee bank is not liable to the holder of an uncertified check, its adverse interests to the drawer make it probable that the duties following presentment and dishonor of a check drawn on itself will not be diligently exercised; therefore it is not a suitable correspondent to select for that purpose. *American, etc., Bank v. Metropolitan, etc., Bank*, 71 Mo. App. 451; *contra*, *Indig v. National City Bank*, 80 N. Y. 100. And since such selection is unreasonable, custom will not excuse it. *American, etc., Bank v. Metropolitan, etc., Bank*, *supra*; *Prideaux v. Criddle*, L. R. 9 Q. B. 455. A second ground for holding the defendant liable is that a bank has no authority to accept payment of a bill sent for collection in any form but money. *Fifth National Bank v. Ashforth*, 123 Pa. St. 212. If a bank does so accept, the depositor should have the right to treat the transaction as a collection and to charge the bank as a debtor. *Fifth National Bank v. Ashforth*, *supra*; *contra*, *Russell v. Hankey*, 6 T. R. 12. For a discussion of the general relationship on collection, see 18 HARV. L. REV. 300.

CARRIERS — DISCRIMINATION AND OVERCHARGE — CARRIER ACTING AS DEALER. — The Chesapeake and Ohio Railroad contracted to deliver coal at the rate of \$2.75 a ton to the New Haven Railroad. This price was less than the cost of the coal at the mines plus the published rates of transportation of the Chesapeake and Ohio from the mines to the point of delivery. *Held*, that as this difference must be considered a rebate from the published tariff, the contract is violative of the prohibitions of the Interstate Commerce Act against personal discrimination; and decreed that the Chesapeake and Ohio be perpetually enjoined from taking less than the rates fixed in its published tariff, by means of the purchase and sale of coal. *New York, etc., R. R. v. Interstate Commerce Commission*, U. S. Sup. Ct., Feb. 19, 1906. See NOTES, p. 453.

CHARITIES — RIGHTS AND LIABILITIES OF CHARITABLE ORGANIZATIONS — TO WHAT CHARITABLE ORGANIZATIONS THE EXEMPTION FROM LIABILITY FOR NEGLIGENCE EXTENDS. — The defendant university was by its charter required to hold all its property solely for the purpose of the education of all fit applicants, and not for its own profit. The plaintiff, who had paid a tuition fee to become a student at the defendant university, lost his eye through the negligence of a professor of the defendant. *Held*, that the defendant, having been chartered solely for an object within the Charitable Uses Act, is not liable for the negligence of its servants. *Parks v. Northwestern University*, 75 N. E. Rep. 991 (Ill., Sup. Ct.).

The general rule is that charitable corporations are not answerable for the negligence of their servants. For a discussion of the application of this rule to the case of hospitals, see 16 HARV. L. REV. 530. The present case applies to this rule the definition of a charity found in the Charitable Uses Act. As this definition is broad in its scope, it will hardly meet with approval from courts which have shown a tendency to limit the rule. *Cf. Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280. For an article opposing the adoption of the definition applied in the principal case, and reviewing the decisions in point, see 1 LAW 645.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — VALIDITY OF TRUST PERFORMABLE OUTSIDE OF JURISDICTION OF ITS CREATION. — A testator, domiciled in New York, bequeathed property to the Bishop of Utah and his successors in office, in trust to acquire land in Utah and to erect a church and rectory thereon to become the property of the Protestant Episcopal Jurisdiction. By the law of Utah the bequest is void because of the indefiniteness of the beneficiaries; by the law of New York, where the common law has been changed by statute (Laws 1893, c. 701), the trust is valid. *Held*, that the law of Utah governs and the bequest is therefore invalid. *Mount v. Tuttle*, 34 N. Y. L. J. 1375 (N. Y., Ct. App., Jan., 1906). See NOTES, p. 457.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — ANNEXATION OF CITIES. An act passed by the Pennsylvania Assembly provided that "when two cities are contiguous and in the same county, the smaller may be annexed to the larger." It was further provided that, "for the purposes of this act, cities separated by a stream, river, or highway shall be included under the term 'contiguous.'" It appeared that the cities of Pittsburg and Allegheny, separated by the Allegheny River, were the only two contiguous cities in the state. The city of Pittsburg instituted proceedings to annex the city of Allegheny in accordance with this act. The plaintiffs, citizens and tax-payers of Allegheny, brought a bill to restrain such proceedings on the ground that the act was in violation of the provision of the state constitution prohibiting special laws regulating the affairs of cities. *Held*, that the plaintiffs are entitled to the injunction. *Sample v. Pittsburg*, 62 Atl. Rep. 201 (Pa.).

The court found that the act applied to a special existing state of facts. The clause that cities are contiguous although separated by a river reinforced their position. If an act can apply to but one section in the state, within the range of probabilities, the legislation is special. *State v. County Court of Jackson Co.*, 89 Mo. 237. When, however, the act is general in its scope, the fact that there is only one situation to which it can apply at the time it is passed does not make it unconstitutional when there is probability that there will be other situations which will come under its terms. *Heinzinger v. State*, 39 Neb. 653. In view of the defendants' answer that there are two towns which are likely to become contiguous cities in the near future, the court might well have construed the act prospectively, and held it constitutional. *Cf. Treanor v. Eichhorn*, 74 Hun (N. Y.) 58. The court, however, considered this a remote contingency. For a full discussion of the principles involved and the wisdom of such a constitutional provision, see 18 HARV. L. REV. 588.

CONSTITUTIONAL LAW — VESTED RIGHTS — MODE OF SETTLING BILL OF EXCEPTIONS. — Before the plaintiff's bill of exceptions was settled the trial judge died. As the law then stood, the excepting party was entitled to a new trial, but a statute, enacted while the suit was pending, provided that any judge of the supreme court might allow exceptions in a case tried by a deceased judge. *Held*, that as the plaintiff has no vested right to a new trial under the law as it stood at the time of the trial, the act may apply to the pending case. *Johnson v. Smith*, 62 Atl. Rep. 9 (Vt.).

Despite a contrary, unsatisfactory Michigan decision, this case seems clear. See *People v. Judge*, 40 Mich. 630. The denial of the existence of vested rights in matters relating to the enforcement of a cause of action is a commonplace of constitutional law. A consideration of the nature of a bill of exceptions renders obvious that it involves a matter pertaining to the remedy and not to the right. *Mason v. Phelps*, 48 Mich. 126. Such a bill is a formal statement by which objections to rulings are raised before an appellate court. The bill should be settled by the presiding justice; but when he is incapacitated or has died before settlement, various rules prevail. See 3 ENCYCL. PR. & PROC. 455. In some states, as was the practice in Vermont derived from England, a new trial is granted as of course. Others allow the successor in office of the ex-judge to settle the bill; while in a few states a transcript of the stenographer's minutes is used. In changing the prevailing method of adjustment by permitting some

other judge to allow the exceptions, the very right of appeal sought by the exceptant is secured and he cannot insist on a fortuitous new trial. Similarly, a statute abolishing the right to a second trial to a losing party in existing causes of action has been sustained. *People ex rel. Long v. District Court*, 28 Col. 161. In fact, the so-called right of appeal itself, even in cases that have gone to judgment, is a privilege that may be abrogated in the absence of express constitutional inhibitions. See *Ryan v. Waule*, 63 N. Y. 57; *Railroad Co. v. Grant*, 98 U. S. 398.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — CONVEYANCE INTER VIVOS UPON ORAL TRUST. — A purchased land, taking the deed in the name of B, who promised verbally to hold the land in trust for C. After A's death B's devisee refused to carry out the trust. *Held*, that C can enforce the trust against B's devisee. *Smoke v. Smoke*, 11 Va. L. Reg. 747 (Va., Cir. Ct., Nov., 1905).

This decision was based upon the ground that the grantee, having title to land not rightfully his own, became constructive trustee for the intended beneficiary, thus taking the case out of the Statute of Frauds. Such a holding can scarcely be supported on principle or authority. *Cf. Campbell v. Brown*, 129 Mass. 23. To hold that the trustee's mere refusal to perform his oral agreement transforms the express *cestui* into a constructive *cestui* would work a substantial abrogation of the Statute of Frauds. Any constructive trust arising out of such a refusal should be in favor of the settlor or his heirs, and such is the English rule. *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. The corresponding American rule, while recognizing no constructive trust, allows the settlor to recover the value of the land conveyed. *Moore v. Horsley*, 156 Ill. 36; *Nugent v. Teachout*, 67 Mich. 571. Where, however, a devise of land is made upon oral trust, the trust is enforceable in favor of the intended *cestui*. *Gilpatrick v. Glidden*, 81 Me. 137. In support of this palpable violation of the Statute of Frauds it has been urged that a constructive trust in favor of the heirs would defeat the deviser's purpose. As the settlor in the present case had died, the above analogy, though anomalous, may afford some support for the decision.

CONTRACTS — DEFENSES: FRAUD — RECOVERY BY SERVANT GUILTY OF WILFUL BREACH NOT GOING TO ESSENCE OF CONTRACT. — The plaintiff in his capacity of manager of the defendant's farm intentionally sent in garbled accounts of his running expenses. *Held*, that the plaintiff cannot recover, on the ground that "a wilful default in the performance of a stipulation not going to the essence of the contract bars a recovery." *Sibley v. Stickney*, 76 N. E. Rep. 226 (Mass.).

Most courts refuse to give a servant who has committed a wilful breach going to the essence of his contract of service any compensation, either on the contract or on a *quantum meruit*. *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *contra*, *Britton v. Turner*, 6 N. H. 481. In view of the fact that a very slight act of dishonesty is ordinarily much more dangerous to the future of the contract than any other sort of default, even though wilful, these courts generally make it a rule that even the least dishonesty necessarily so goes to the essence of the contract as to bar recovery. *Libhart v. Wood*, 1 Watts & S. (Pa.) 265. It would seem, therefore, that the Massachusetts court, which supports the majority view, might properly on this reasoning have refused redress. *Cf. Homer v. Sharv*, 177 Mass. 1. But the opinion expressly waives this possibility, and bases itself squarely on the ground that the breach, though non-essential, nevertheless, being wilful, precludes recovery. The farthest that previous decisions have gone is to refuse wages to a servant discharged for an act of wilful disobedience which, though essential, did not injuriously affect the future of the contract. *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351; *Beckman, Jr. v. Garrett*, 66 Oh. St. 136. The present decision goes a dangerous distance beyond these; and it is doubtful whether the Massachusetts court would follow its doctrine if the breach, though intentional, were absurdly trivial. The materiality of the servant's breach, being the criterion of his value, should furnish the primary test for the master's

liability, so that in some cases, notably where the element of dishonesty is present, the servant's motive may play an important part in determining the materiality of his breach. See *Shaver v. Ingham*, 58 Mich. 649.

CONTRACTS — DEFENSES — IMPOSSIBILITY. — The plaintiff, a seaman, contracted with the defendant to go on a voyage from Glasgow to Hong-Kong and return, ports in any rotation. After proceeding part of the way on the voyage, the plaintiff learned that the vessel was laden with contraband of war and bound for a Japanese port. *Held*, that he was justified in refusing to go on. *Sibery v. Connelly*, 22 T. L. R. 174 (Eng., K. B. D., Dec. 18, 1905). See NOTES, p. 462.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT — CITIZENS SUING ON CONTRACT TO SUPPLY CITY WITH WATER. — A water company, the defendant's predecessor, made a contract with a village to supply the residents thereof with water at rates not exceeding a fixed maximum. *Held*, that a resident may sue in equity to restrain the defendant from collecting a higher rate. *Pond v. New Rochelle Water Company*, 34 N. Y. L. J. 1237 (N. Y., Ct. App., Jan. 9, 1906).

In New York the *Lawrence v. Fox* doctrine, which was originally restricted to cases where the promisee was under some legal or equitable obligation to the third person, has been extended to cases of mere moral duty, such as a parent owes to a child, or a husband to his wife. See 15 HARV. L. REV. 767, 780. This case makes a further extension in holding that the interest which a municipality has in providing its inhabitants with water at reasonable rates is sufficient to entitle an inhabitant to sue on a contract between the municipality and a water company. But see *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.) 146, 152. Yet in New York, as elsewhere, a third party acquires no right to sue merely because he is incidentally benefited by the contract. *Durnheer v. Rau*, 135 N. Y. 219. And courts hold almost universally that a contract between a city and a water company to furnish water at a certain pressure is intended for the benefit of the community as a whole and not of individuals; so that one whose house is destroyed by fire through the failure of the water company to provide the requisite amount of pressure has no action on the contract. See 15 HARV. L. REV. 767, 784; 13 *ibid.* 226. In the principal case it is less difficult to contend that the contract was intended to benefit the individual consumers. See *Allen & Currey Mfg. Co. v. Shreveport Water Works Co.*, 113 La. 1091; *contra*, *Cleburne Water Co. v. City of Cleburne*, 13 Tex. Civ. App. 141, 143.

CRIMINAL LAW — GROUNDS FOR GRANTING NEW TRIAL — READING OF NEWSPAPER BY JURORS. — In a trial for murder the jury returned a verdict of guilty in the first degree. The defendant sought a new trial on the ground that several jurors during the trial had read a newspaper article upon the case exhibiting a strong bias against him. *Held*, that though the reading of the article was misconduct, it furnishes no ground for a new trial, since the rest of the record so clearly establishes the defendant's guilt that whether the jury read the article or not they could have returned no other verdict. One justice dissented. *State v. Williams*, 105 N. W. Rep. 265 (Minn.).

In general an appellant, to obtain a reversal, must show not only that error occurred, but that he was substantially prejudiced thereby. *Milby v. United States*, 120 Fed. Rep. 1. The fact that one or more jurors during a trial for felony read newspaper comments on the crime or case is generally conceded to be misconduct. *Moore v. State*, 36 Tex. Cr. App. 88. Yet, if it appears that the comments were either favorable to the appellant or not of a nature to prejudice the jury against him, this will not be ground for reversal. *United States v. Reid*, 12 How. (U. S.) 361. If, however, the nature of the article read was such as might have aided the jury in arriving at their verdict, the great weight of authority is that a new trial should be granted. *Mattox v. United States*, 146 U. S. 140; *People v. Stokes*, 103 Cal. 193. It seems just that where the rest of the record independently establishes the defendant's guilt beyond a reasonable doubt, there should be no reversal for error as to

a point of law. *Milby v. United States*, *supra*. But whether a similar rule should apply to prejudicial misconduct by the jury is questionable, on grounds of public policy. By the weight of authority, at any rate, prejudicial misconduct is absolute ground for reversal. *Commonwealth v. Landis*, 12 Phila. (Pa.) 576.

CRIMINAL LAW — SENTENCE — UNAUTHORIZED FIXING OF MAXIMUM TERM OF IMPRISONMENT. — The petitioner was convicted under an Indeterminate Sentence Act, requiring the court to fix the minimum term while the maximum is provided by law. The trial court, however, besides fixing a minimum term, added a maximum below the statutory period. After the expiration of this maximum period the prisoner brought *habeas corpus*. *Held*, that the petitioner is subject to the statutory maximum, and the writ therefore does not lie. Two judges dissented. *Ex parte Duff*, 105 N. W. Rep. 138 (Mich.).

A writ of *habeas corpus* is properly brought for the detention of a prisoner after his term of imprisonment has expired. *Ex parte Lange*, 18 Wall. (U. S.) 163. The Michigan court has already held that the act in question does not authorize the court to fix a maximum term. *In re Campbell*, 101 N. W. Rep. 826. The maximum provided by law automatically operates as part of the sentence. The question therefore is: did the imposition of the unauthorized maximum operate as a substitution for the statutory maximum? The weight of authority and the current tendency are that a sentence is valid as to the extent of the court's authority, and a nullity as to the excess. *In re Taylor*, 7 S. Dak. 382. A prisoner improperly sentenced below the statutory minimum cannot procure an immediate discharge on a writ of *habeas corpus*. *State v. Klock*, 48 La. Ann. 67; but see *Ex parte Berner*, 62 Cal. 524. Nor will it issue for an excessive sentence. *People v. Baker*, 89 N. Y. 460; *United States v. Pridgeon*, 153 U. S. 48, 62. Therefore, in the present case, immediately after sentence, the prisoner's only remedy would have been a writ of error, resulting simply in a remanding of the judgment so as to strike out the unauthorized maximum, a result of no practical benefit to the prisoner. Nor should a different result be reached after the inadequate sentence is served. The unauthorized maximum is clearly severable as a surplusage from the proper minimum, and the prisoner's rights are to be determined as though no maximum were fixed.

DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — LIMITATION OF ACTION. — *Held*, that under a statute which allows a personal representative an action for the wrongful death of the deceased, the cause of action accrues, not upon the death, but upon the appointment of the administrator. *Crafo v. The City of Syracuse*, 76 N. E. Rep. 465 (N. Y.). See NOTES, p. 458.

DECEIT — PARTICULAR CASES — NEGLIGENTLY DEALING WITH WORTHLESS NOTE. — The defendant, after forging a promissory note with intent to defraud any one to whom it should come, negligently left it where a wrongdoer found it. Later the wrongdoer put it into circulation. The plaintiff, a *bona fide* purchaser, brought an action of tort. *Held*, that he has no cause of action. *Costello v. Barnard*, 34 Banker and Tradesman, 195 (Mass., Sup. Ct., Jan. 8, 1906).

The first requisite of deceit is a representation by the defendant to the plaintiff or to the class to which the plaintiff belongs. See *Polhill v. Walter*, 3 B. & Ad. 114. Here the defendant was merely preparing to make a representation to the plaintiff. In a somewhat analogous case of libel, if a defendant should carelessly leave a defamatory document on his desk where a third person might reasonably be expected to see it, and some third person did see it, that might be a sufficient publication. See ODGERS, LIBEL AND SLANDER, 4th ed., 156. But in a case like the present, it is far more difficult to maintain that the defendant should be held liable, if some wilful intervening person should take active measures to lay before the plaintiff a representation which the defendant himself was merely preparing to make. And an action for negligence, *eo nomine*, could not lie here, because the negligence was not the proximate cause of the damage. That a general fraudulent intent accompanies the negligence ought not to create an absolute liability. If A, after loading a gun

with intent to shoot B, negligently leaves it where C finds it, and if C then willfully shoots B, A could scarcely be held liable to B. But *cf. Meade v. C., R. I. & P. Ry. Co.*, 68 Mo. App. 92, 101.

DEEDS — EXCEPTIONS AND RESERVATIONS — RESERVATION OF EASEMENTS: OPERATION AS RESTRICTIVE AGREEMENT. — A deed poll contained the clause: "A passageway is to be kept open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by . . . (the grantee) and five feet by me from land lying east of the land here conveyed." There was no existing passageway. An action was brought after the grantor's death for breach of a warranty against incumbrances in a later deed. *Held*, that the clause, though not creating a legal easement by way of exception or by reservation beyond the grantor's life, is a restrictive agreement perpetually enforceable in equity and therefore is an incumbrance. *Bailey v. Agawam Nat. Bank*, 76 N. E. Rep. 449 (Mass.).

According to most American decisions, the clause would create a legal easement in fee in the grantor, though "heirs" be not mentioned. 13 HARV. L. REV. 404; *Winthrop v. Fairbanks*, 41 Me. 307. Massachusetts, having denied the creation by exception or reservation of an easement for longer than the grantor's life, later introduced a questionable modification allowing the exception in fee of a way already located. *White v. N. Y., etc., Rd. Co.*, 156 Mass. 181. The present novel decision is a further advance, but by a more scientific route, toward desirable uniformity with the prevailing view. Although not decided in this case, it would seem also that language of exception, reservation, or regrant should be construed as an agreement by the grantee. *Cf. Case v. Haight*, 3 Wend. (N. Y.) 632. A restrictive agreement is, of course, enforceable against subsequent grantees with notice. *Tulk v. Moxhay*, 2 Ph. 774; see 17 HARV. L. REV. 174. And since recording acts provide sufficient constructive notice, it appears that reservations of rights in granted property are fully effectual in Massachusetts, though some of the remedies must be sought in equity. The case must be regarded as overruling the effect of former decisions denying equitable relief, after the immediate grantor's death, upon clauses which are, to say the least, distinguishable with great difficulty from that in question. *Cf. Ashcroft v. Eastern Rd. Co.*, 126 Mass. 196; *Simpson v. Boston, etc., Rd.*, 176 Mass. 359.

EVIDENCE — CONFESSIONS — NECESSITY FOR CORROBORATION. — The defendant was charged with forging a warranty deed and, while under arrest, made a full written confession of his guilt. At the trial no independent evidence whatever was given to prove the forgery. *Held*, that the confession alone was insufficient to sustain a conviction. *Blacker v. State*, 105 N. W. Rep. 302 (Neb.).

The view of the early common law was that a confession, being so strongly against interest, was the most reliable kind of evidence. See *Attorney-General v. Mico*, Hard. 137, 139. It is reasonably clear that until the last century extrajudicial confessions in England were received in evidence without corroboration. *Cf. Hule's Trial*, 5 How. St. Tr. 1186, 1189. This is, perhaps, the present English rule, except in cases of homicide. *Rex v. Unkles*, 11 R. 8 C. L. 50, 58; see 3 WIGMORE EV., § 2070, note 4. While the point is still unsettled in a few American jurisdictions, the great majority of courts, probably influenced by a desire to guard against false confessions and to increase the humanity of the criminal code, will not receive an extrajudicial confession without corroborative evidence. Of these, some hold that any related facts consistent with the truth of the confession are sufficient to support it. *Bergen v. People*, 17 Ill. 426. The greater number require independent evidence of the *corpus delicti* itself. *Johnson v. The State*, 59 Ala. 37. A few require evidence not only to prove the criminal act, but to show the defendant's connection therewith. *Harris v. The State*, 28 Tex. App. 308. The first of the three views just noted seems preferable because it lets in valuable evidence without unnecessary caution.

EVIDENCE — DYING DECLARATION — SUBJECT-MATTER OF DECLARATION. — The defendant, a railroad brakeman, was prosecuted for the murder of

a young boy whom he shot from the caboose of a train. His defense was that having been struck by a stone he shot without seeing any one, for the purpose of scaring the person who had thrown the stone. The government introduced the deceased boy's dying declaration that he had not thrown anything at the train nor incited anybody to do so. *Held*, that the declaration is admissible. *Burroughs v. United States*, 90 S. W. Rep. 8 (Ind. T.).

Like other exceptions to the rule against hearsay evidence, the courts have treated rigorously dying declarations. This exception has now become limited to cases of criminal homicide where the cause of the declarant's death is the subject-matter of the indictment. 2 WIGMORE, EV., 1st ed., §§ 1432, 1433. How closely the declaration must relate to "the circumstances of the death" has not been clearly defined. The tendency of the courts has been to construe this phrase strictly to mean the immediate circumstances of the death. An extreme example was the exclusion of a declaration as to an occurrence of three hours before the fatal injury. *People v. Smith*, 172 N. Y. 210. In general the courts have excluded statements as to prior transactions. *State v. McKnight*, 119 Ia. 79. If the declaration in the present case related to any past transaction, according to authority it would be inadmissible; but fairly construed it relates to "immediate circumstances" so that the ruling seems in accordance with precedent. *State v. Parker*, 172 Mo. 191. Indeed courts might well admit declarations as to prior transactions provided they concerned facts relating to the declarant's death, for such declarations seem within the real reason of the exception, namely, the difficulty of securing other evidence. See *State v. Petsch*, 43 S. C. 132.

FEDERAL COURTS—JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP—JOINT ACTIONS. — The plaintiff's intestate was killed by a train operated by an Alabama corporation. The plaintiff sued the company and the conductor and engineer of the train jointly on the ground that the two last-named persons were guilty of negligence in managing the train. His action against the company was based solely upon the latter's liability as principal for the acts of its servants. The plaintiff, the conductor, and the engineer were all citizens of Tennessee; the company had been incorporated in Alabama. A federal statute provided that when there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, it may be removed to the federal courts. *Held*, that this cause is not removable from the state to the federal courts, even though the actions against the company and against the officials were not properly joined, because by electing to sue the defendants jointly, the plaintiff has determined the character of the controversy, and, for purposes of jurisdiction, it will be considered joint. *Alabama, etc., Ry. Co. v. Thompson*, U. S. Sup. Ct., Jan. 2, 1906.

For a discussion of a similar case, see 17 HARV. L. REV. 494.

HUSBAND AND WIFE — VOLUNTARY ANTENUPTIAL CONVEYANCES. — The defendant held title to land under a voluntary conveyance from his father, not recorded until after the second marriage of the father. This deed was made with intent to defeat the marital rights of any one the father might thereafter marry. *Held*, that equity will give the grantor's widow dower and homestead in the premises, even though at the time of conveyance she and the deceased grantor were strangers. *Higgins v. Higgins*, 76 N. E. Rep. 86 (Ill.). See NOTES, p. 459.

INSURANCE — CONSTRUCTION OF PARTICULAR PHRASES IN STANDARD FORMS — INCONTESTABILITY. — An insurance contract contained the following clause: "This policy is incontestable from date of issue for any cause, except non-payment of premiums." The insurance company had, however, actually relied on the representations of the insured at the time of issuing the policy. *Held*, that in an action on the policy the company is not debarred from the defense of fraud. *Reagan v. Union Mutual Life Ins. Co.*, 76 N. E. Rep. 217 (Mass.).

It is a well-recognized doctrine that a clause in an insurance policy providing for incontestability after a reasonable lapse of time will debar the insurer

after the lapse of such time from setting up fraud as a defense in an action on the policy. *Wright v. Mutual, etc., Ass'n*, 118 N. Y. 237. By this doctrine such a clause is regarded as analogous to the statutes of limitations, and supportable on the same grounds. But when the clause provides for immediate incontestability, and the insurer nevertheless relies on the false representations of the insured, to the latter's knowledge, it seems clearly against public policy to give effect to the provision. *Cf. Welch v. Union Central Life Insurance Co.*, 108 Ia. 224. The court, however, explicitly disclaims any intention of passing upon the availability of the defense in a case where, though there were fraudulent representations in fact, yet the contract was not induced by reliance upon such representations, but by an investigation conducted by the defendant.

MARRIAGE — VALIDITY — EFFECT OF SECURING DIVORCE FROM PRIOR HUSBAND AFTER REMARRIAGE. — The plaintiff, *bona fide* though erroneously believing her former husband dead, went through the form of marriage with the defendant. Later, merely as a matter of precaution, she secured a divorce from her former husband, and for many years continued to cohabit with the defendant as his wife. In a suit for support, brought by the wife, the defendant relied on the absence of a lawful marriage. *Held*, that the plaintiff became the lawful wife of the defendant after the divorce. *Chamberlain v. Chamberlain*, 62 Atl. Rep. 680 (N. J., Eq.).

When a man and a woman have lived together illicitly, a presumption arises that their subsequent relations continue illicit, and this presumption may be overcome only by proof of a later express contract for lawful marriage. *Appeal of Reading Fire Ins. Co.*, 113 Pa. St. 204. The analogy would seem complete between this class of cases and those involving a relation impossible of valid consummation because of some legal, though unknown, impediment. No such express contract could probably be found in the present case, as the parties would naturally rely upon the supposedly binding marriage, rather than upon any theory of a common law marriage after the divorce. *Cf. Holabird v. Atl. Ins. Co.*, 2 Dill. (U. S. C. C.) 166 n. This reasoning thus results in giving a morally innocent relation no greater effect than an oblique one. The present decision, in recognizing the marriage, reaches a desirable result without developing the reasons therefor. Such a result is obtainable by arbitrarily eliminating the presumption of a continuing illegality in the relation on account of the moral innocence of the parties, or by invoking the doctrine of estoppel. *Cf. Foster v. Hawley*, 8 Hun (N. Y.) 68; *Chamberlain v. Chamberlain*, 59 Atl. Rep. 813.

PLEDGES — DUTY OF PLEDGEE TO SELL — REQUEST BY PLEDGOR. — In answer to a suit on a note the defendant alleged that upon the maturity of the note he had requested the plaintiff to sell the shares of stock pledged with the plaintiff as security, and that the stock, if then sold, would have been sufficient to pay all claims of the plaintiff upon the note. *Held*, that this is a good defense. *Bank of Pittsburgh v. Porter*, 36 Pittsb. Leg. J. 169 (Pa., C. P. No. 3, Allegheny Co., Nov. 25, 1905).

It is more commonly said, there being one or two holdings and several *dicta* to this effect, that a pledgee is under no duty to sell the pledge at the request of the pledgor. *Cooper v. Simpson*, 41 Minn. 46; *Mueller v. Nichols*, 50 Ill. App. 663. Yet it seems desirable to hold that by his acceptance of the pledge the pledgee becomes bound to sell it at the request of the pledgor, the principal debt being due, provided that the market value of the pledge exceeds the principal debt. *Cf. Moore v. Brooks*, 2 Pa. Co. Ct. 619; see *Richardson v. Insurance Co.*, 27 Gratt. (Va.) 749, 753. In cases where the market value of the pledge is less than the principal debt, the pledgee should not be subjected to any duty to sell at the pledgor's request, since the pledgee, too, has an interest in the pledge, and should not be deprived of the chance of an increase in the value of his security. But the moment the value of the pledge exceeds the amount of his debt, he no longer has any interest to serve in not selling the pledge, and therefore should not be

allowed needlessly to embarrass a pledgor who is unable to redeem by subjecting him to the risk, often the certainty, of depreciation of the pledge. *Cf. STORY, BAILMENTS* § 320.

POLICE POWER — PUBLIC SERVICE AGENCIES — PUBLIC PLACES OF AMUSEMENT. — A statute made it unlawful to exclude from a public place of amusement any one who demands admission with a ticket acquired by purchase. The plaintiff was excluded from the defendant's race track, although he had complied with all the requirements of the statute. The defendant contended that the statute was unconstitutional. *Held*, that it is constitutional. *Greenberg v. Western Turf Ass'n*, 82 Pac. Rep. 684 (Cal.).

The extent of the power of the state to impose upon businesses the duties and obligations of public service companies is very ill-defined. It seems to be clearly settled that the police power will justify the classification of virtual monopolies among public service industries. *Munn v. Illinois*, 94 U. S. 113. The Supreme Court has also sustained a statute imposing a maximum charge to be made by grain warehousemen, although there was no monopoly in the warehousing business. *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391. It seems impossible to tell upon just what principle this last case was decided. A leading text-writer maintains that even after this decision the power of the state does not extend to all industries, but that it is limited to a regulation of businesses essential to industrial welfare. FREUND, *POLICE POWER* § 378. Obviously under this definition of the power of the state, public amusements cannot be subjected to regulation as public service companies. See TIEDEMAN, *POLICE POWER* 232; *contra*, COOLEY, *TORTS* 285. The decisions sustaining statutes aimed against discrimination against negroes afford no support to the principal case, since the constitutionality of such statutes is based upon the public policy opposed to race discrimination.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — AGREEMENTS COLLATERAL TO SALES. — A steamship company operating on the Ohio River sold its boats to another river company, agreeing not to compete with the latter company for five years. Business between Ohio and probably Kentucky ports was contemplated. *Held*, that such an agreement, though touching interstate commerce, is not within the Sherman Act. *Cincinnati, etc., Packet Co. v. Bay*, U. S. Sup. Ct., Jan. 2, 1906.

Although the Supreme Court has repeatedly declared that the Sherman Act extends to all restraints of trade, even reasonable, it had let fall observations indicating that it did not consider the collateral agreement of a vendor of a business to withdraw from competition as obnoxious to the Act. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 567. Acting on the suggestion, a New York court held valid a restrictive agreement connected with the sale of the good will of a coast-trade packet company. *Brett v. Ebel*, 29 N. Y. App. Div. 256; see 12 HARV. L. REV. 129. A later case in a federal court tends in the same direction. See *Davis v. A. Booth & Co.*, 131 Fed. Rep. 31. The present decision is therefore an affirmation of the distinction made in these cases; but the principle upon which it is founded seems far from clear. The lower federal courts have upheld restrictions imposed by a vendor upon the sale of his goods. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454; see also 17 HARV. L. REV. 480. And the Supreme Court has similarly allowed restrictions on the licensee of a patent right. *Bremont v. National Harrow Co.*, 186 U. S. 70. All such contracts undoubtedly tend to restrain trade; and as the exceptions to the strict doctrine of the Supreme Court multiply, its qualified application will probably come to effect substantially the same results as a construction that applies the Act only to unreasonable restraints. See *Northern Securities Co. v. U. S.*, 193 U. S. 197, 360.

SALES — RIGHTS AND REMEDIES OF SELLER — EQUITABLE LIEN FOR PURCHASE PRICE. — The plaintiff's mother by her will left to him a legacy of the equitable reversionary interest in £5000, the prior life interest being in his

father, who held the legal title to the fund as sole trustee of the legacy. The plaintiff assigned his reversionary interest to his father for the sum of £1500. After the father's death, the plaintiff claimed against the father's estate a lien on the legacy for the purchase price and interest, as unpaid vendor. *Held*, that the lien was maintainable, as the doctrine of vendor's equitable lien is not limited to realty. *Stucley v. Kekewich*, 93 L. T. R. 718 (Eng., Ct. App., Nov. 7, 1905).

The vendor's equitable lien for the purchase price of real estate is looked upon, in this country at least, with increasing disfavor, and, except under the peculiar doctrine of Louisiana, there seems to be no authority here for extending it beyond interests in realty. *Cf. Sharp v. Kerns*, 2 Gratt. (Va.) 348; *Flint v. Rawlings*, 20 La. Ann. 557. In England, also, the lien is in general confined to realty and chattels real. See *Mackreth v. Symmons*, 15 Ves. Jun. 329, 343. The court in the present case relies upon a former English decision which is distinguishable on the ground that the subject-matter, though not realty, was the sum to be derived from the sale of leaseholds, a point emphasized by the only judge relying upon the doctrine of vendor's lien. *Davies v. Thomas*, L. R. [1900] 2 Ch. 462. A case relied upon in *Davies v. Thomas* is also distinguishable on the ground that the chose in action was not reduced to the possession of the purchaser. *Collins v. Collins*, 31 Beav. 346. In the present case the fund had actually come into the hands of the purchaser, as he himself was trustee of the fund. Accordingly there seems to be little authority for making this extension of a principle which in its present scope is of doubtful expediency.

SPECIFIC PERFORMANCE — LEGAL CONSEQUENCES OF RIGHT TO SPECIFIC PERFORMANCE — CONTRACT TO DISPOSE OF ESTATE AFTER DEATH. — The defendant furnished the decedent with maintenance on condition that all the decedent's property should descend to and belong to him at the decedent's death. After the death the defendant took possession of all the property, which consisted of a sum of money, and paid the funeral expenses. The administrator sued for the balance of the fund, without alleging that there were other creditors of the estate. *Held*, that he cannot recover, as the defendant is the equitable owner of the money. *Koslowski v. Newman*, 105 N. W. Rep. 295 (Neb.).

A man may validly bind himself or his estate to dispose of his property in a particular way. *Sutton v. Hayden*, 62 Mo. 101. The contract will be specifically performed after the death of the promisor if the property is realty. *Emery v. Darling*, 50 Oh. St. 160. If there are both realty and personalty, specific performance is granted as to both. *Schutt v. Missionary Society*, 41 N. J. Eq. 115. Equity assumes jurisdiction because realty is involved, and the whole case is then settled in one proceeding. But when the property is all personalty, as in the present case, no more reason for specific performance exists than in any other contract for the delivery of personalty. There is an adequate remedy by a suit at law, the measure of damages being the value of the property. *Wellington v. Apthorp*, 145 Mass. 69. The statement in the case that the defendant was the equitable owner with a right to specific performance is not supported by authority. The citations by the court are either *dicta* or cases involving both realty and personalty. The decision may be explained, however, on the ground of avoiding circuity of action. Although the administrator had a right to recover the money, it was useless to permit him to exercise it, as the defendant had a legal claim against the estate for the full value of the property, and there were no other creditors to be paid from the fund.

TAXATION — PARTICULAR FORMS OF TAXATION — THE NEW YORK STOCK TRANSFER TAX. — A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfer of shares or certificates of stock in any domestic or foreign . . . corporation . . . on each one hundred dollars of face value or fraction thereof," a tax of two cents. *Held*, that the tax is constitutional. *People ex rel. Hatch v. Reardon*, 34 N. Y. L. J. 1457 (N. Y., Sup. Ct., Jan. 1906). See NOTES, p. 460.

TORTS — NEGLIGENCE — LIABILITY OF TELEGRAPH COMPANY IN TORT TO ADDRESSEE. — The defendant having delivered to the plaintiff a telegram incorrectly transmitted, the latter brings this action of tort to recover for the loss occasioned thereby. The defendant insisted that it owed the plaintiff no duty; that it had been guilty of no negligence; and that by the terms under which the message had been received from the sender, of which the plaintiff had notice, it had restricted its liability. *Held*, that a duty to take reasonable care to transmit messages correctly is imposed on the defendant company by law; that proof that the message was incorrectly transmitted raises a presumption of negligence on the part of the defendant which throws on it the burden of proving its own due care and that the defendant cannot limit its liability to the addressee in the manner claimed. *First National Bank v. Western Union Tel. Co.*, 34 N. Y. L. J. 1475 (N. Y., Municipal Court, Jan., 1906).

England allows the addressee no action for mere negligence. *Playford v. United Kingdom, etc., Tel. Co.*, L. R. 4 Q. B. 706. By the weight of American authority, a telegraph company, having accepted a dispatch, owes to the addressee a duty to take reasonable care to transmit it correctly, and is liable to him in tort for damages sustained through a breach thereof. *Western Union Tel. Co. v. Dubois*, 128 Ill. 248. It seems also that proof that the dispatch was incorrectly transmitted raises a presumption that the company has been negligent, and throws upon it the burden of proving its own due care. *Reed v. Western Union Tel. Co.*, 135 Mo. 661; *contra, Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226. As to the measure of damages there is great confusion. Some authorities hold that since the duty to the addressee arises by reason of the contract, the conditions of that duty are defined by the contract, at least where the addressee had notice of the limitations. See *Ellis v. American Tel. Co.*, *supra*. But the better view seems to be that a liability in tort imposed by law cannot be restricted by mere notice of an agreement to which the addressee is not a party. *New York, etc., Tel. Co., v. Dryburg*, 35 Pa. St. 298.

TORTS — NUISANCE — PRINTING MACHINERY IN DISTRICT DEVOTED TO PRINTING TRADE. — The plaintiff resided in a district almost entirely devoted to the printing trade. No appreciable disturbance, however, had been caused to the plaintiff at night. The defendant erected in a house adjoining the plaintiff's an improved modern printing machine which was run at night when necessary, and the noise from which caused considerable disturbance to the plaintiff. *Held*, that the injunction granted by the court below on the ground that the defendant is maintaining a nuisance will not be set aside. *Rushmer v. Polsue ad Alfieri*, [1906] 1 Ch. 234.

Every landowner has a legal right to have the air above his land free from such atmospheric vibrations, caused by an improper use of adjacent land, as produce in ordinary persons material bodily discomfort. The determination of what constitutes a reasonable and proper use of one's land depends on a weighing of the conflicting rights of a landowner to the undisturbed enjoyment of his property, of the neighbor to carry on suitable and useful occupations, and of the public to have industrial development unhampered by positive law. The English courts seem inclined to over-emphasize the first of these rights in comparison with the other two. See *Bamford v. Turnley*, 3 B. & S. 62; but *cf. Christie v. Davey*, [1893] 1 Ch. 316. The question to be answered on the particular facts of each case is this: is the disturbance to the plaintiff's person or property such as he ought to acquiesce in as one of the unavoidable inconveniences of living in society? Obviously, then, a useful occupation which would constitute a nuisance in a residential district might not be unlawful in another locality largely devoted to that occupation. *Cf. Gilbert v. Showerman*, 2 Mich. N. P. 158; *Robinson v. Baugh*, 31 Mich. 290. In the present case the lower court seemed to recognize this distinction in the rules of law; and while the upper court refused to set aside the injunction granted below, it expressed the opinion that it would have decided differently on the facts.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACT — WHETHER CONTRACT UNENFORCEABLE FOR USURY IS CURED BY ESTOPPEL. — A gave

B, his client to whom he was indebted, his promissory note at full legal interest, together with usurious security, and assured B that the transaction was all right. In an action on the note, brought by an assignee of B with notice of the usury, A set up the defense of usury. *Held*, that the plaintiff can recover on the note, as the representation by A to B, though as to a question of law, operates like a representation of fact where there is a confidential relation between the parties, and A is therefore estopped to assert his defense. *Hungerford Co. v. Brigham*, 95 N. Y. Supp. 867. See NOTES, p. 454.

WATERS AND WATERCOURSES — APPROPRIATION — EXTENT OF RIGHT FOR PURPOSE OF IRRIGATION. — An owner of lands in Nevada contiguous to a non-navigable stream sought to restrain an upper riparian owner of lands in California from diverting the water for irrigation. The court assumed that the land through which the stream flowed belonged originally to the federal government, and that before the defendant's predecessor in title had settled, the plaintiff's predecessor had appropriated for irrigation a quantity of water equal to the entire flow during the dry season. *Held*, that the defendants may be enjoined only from diverting the water for more than five of every ten days during the dry season. *Anderson v. Bassman*, 140 Fed. Rep. 14 (Circ. Ct., N. D., Cal.).

One who has by priority of possession acquired rights under the law of a state to the water of a stream flowing through public lands, is protected in them as against subsequent grantees of the federal government, even though the lands later granted lie in a different state. U. S. Rev. Stat. §§ 2339, 2340; *Howell v. Johnson*, 89 Fed. Rep. 556. Hence the principal case raises no question in the conflict of laws. The plaintiff as against the defendant is entitled to such rights as have accrued under the law of Nevada. By this law an owner by prior appropriation gains a paramount right to the quantity of water which he has appropriated to a beneficial use. See *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269; *Bliss v. Grayson*, 24 Nev. 422, 456. The California decisions adopt the common law rule of reasonable user, that a riparian owner can at any time take for irrigation only his proportionate share determined by the number of other riparian owners applying the water to an equally beneficial use. See *Lux v. Haggin*, 69 Cal. 255, 311, 397; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73, 93. The present decision holds that the rights under the laws of the two states are identical and enforces the California rule. Such an interpretation of the Nevada law is questionable, and finds explanation only in the desire to curtail the doctrine of appropriation so as to permit irrigation of the largest possible area.

WILLS — CONSTRUCTION — RESTRAINTS ON ALIENATION IN DEVISES TO MARRIED WOMEN. — Land was devised to the plaintiff, a married woman, for her separate use, with the provision that if she should sell the land the proceeds must be invested in other real estate and the purchaser must see to such reinvestment, and until then title should not pass, nor should anything bar or estop the plaintiff from recovering or retaining the land devised. The plaintiff conveyed the land to the defendant, but there was no reinvestment of the proceeds in real estate. *Held*, that no title passed, and the plaintiff may recover the land. *Bell v. Bair*, 89 S. W. Rep. 732 (Ky.).

Apart from the provision under discussion, the words of this devise appear, through legal construction and the operation of state statutes, to give the plaintiff the fee as a separate estate. See 4 MICH. L. REV. 292 (but *cf.* *Ball v. Hancock's Adm'r*, 82 Ky. 107, as to whether the fee here is base). The present question, however, would seem to be the same in legal effect, were there a life estate. While restraints on the alienation of estates in fee, for life, or probably for years are generally void, there is a well-recognized exception in the case of the separate estates of married women. See GRAY, RESTRAINTS ON ALIENATION, 2d ed., §§ 140-142, 125-126 a, 269-278 a. The alienation of such estates may be absolutely restrained, unless possibly a married woman cannot be prevented from transferring a fee, subject to her right to receive the income during her life. See GRAY, RESTRAINTS ON ALIENATION, 2d ed., § 126. Even this

concession would not prevent a conveyance, purporting to transfer unconditionally the whole fee, from being void. If, then, the settlor may prevent absolutely a purchaser of such estate from obtaining title, it seems to follow that he may impose a condition precedent to alienation, the happening of which is necessary before the purchaser obtains title. The Kentucky court here follows a previous decision on the same will to this effect. *Cf. Bell v. Mitchell*, 17 Ky. Law Rep. 1334.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

SPECIFIC PERFORMANCE OF NEGATIVE AGREEMENTS IN AFFIRMATIVE CONTRACTS. — An attempt in a recent article to define more narrowly the limits of equity's jurisdiction in the enforcement of negative clauses in affirmative agreements involves the elimination of the doctrine for which the leading case of *Lumley v. Wagner* (1 De G., M. & G. 604) stands. *Specific Performance by Injunction*, by Clarence D. Ashley, 6 Columbia L. Rev. 82 (Feb., 1906). The position is taken that if equity cannot directly bring about a complete performance of the contract, it should never intervene to compel part performance only. In the view of the writer, this rule would not prevent an injunction issuing in cases of contracts of which the negative part alone remained to be performed; of contracts of which the affirmative part, though executory, was capable of enforcement; or of contracts in which the affirmative agreement, though executory and unenforceable, was on the way to fulfillment. It would, however, prevent relief on the negative side whenever an affirmative, unenforceable contract was also broken. It is contended that the earlier cases support this distinction, and that Lord St. Leonards in *Lumley v. Wagner* misunderstood them; but the present interpretation of these authorities is too strained to be conclusive. On principle, two arguments are developed in support of the proposition presented. It is said, in the first place, that equity in enforcing a negative agreement which is connected with an unperformed, unenforceable affirmative clause, is attempting to do indirectly what it has denied its power to do directly. Undoubtedly one effect is a moral suasion of the defendant to perform the rest of his contract; but, for instance, where he has covenanted not to serve any one other than the plaintiff, he has his choice also of remaining idle or of going into some other occupation. Nor is the possible indirect result that for which the injunction is sought; rather is it the prevention of affirmative harm to the plaintiff, which the employment by a rival of the plaintiff's great prima donna, for example, would effect, irrespective of the breach of the affirmative agreement. In the second place, Dean Ashley claims that injustice is likely to flow from granting part performance when the obligation as a whole is unenforceable. To clinch his point, the writer cites *Montague v. Flockton* (L. R. 16 Eq. 189), in which a manager was allowed an injunction, although he had already incapacitated himself from performing by filling the defendant's place. Under the special circumstances the plaintiff had no equity, and the case is wrong in any view. But if there are situations where equity can aid without doing injustice, why should it not do so?

In England the trend is probably in the direction of Dean Ashley's proposition. See *Metropolitan, etc., Co. v. Ginder*, [1901] 2 Ch. 799, 805. In the United States, however, the tendency is to give partial relief, when complete enforcement is impossible, on the general equitable principles relating to the specific performance of other contracts. Even in the absence of express negative clauses, it is recognized that every contract contains an implied agreement to do nothing inconsistent with its completion, and when the breach of this implied restriction causes positive harm other than that resulting from the breach of the affirmative part alone, the usual test as to the inadequacy of the legal remedy

is applied. See *Carter v. Ferguson*, 58 Hun (N. Y.) 569; *Duff v. Russell*, 60 N. Y. Super. Ct. 80; affirmed 133 N. Y. 678. Arguing for the moment from *Lumley v. Wagner* as a basis, Dean Ashley advances the novel proposition that under the theory of that case no difference should be made between a great and an obscure actor, on the ground that men differ as much as land. The truth of this statement may well be doubted; from a practical standpoint a manager rarely attaches importance to the individuality of his "supers." But granting that the argument might apply were the question of enforcing a contract for personal service open, it is of no weight in the case of a negative agreement: for the damages are manifestly adequate, because nominal, unless the actor is of sufficient ability to attract patrons to his new manager to the affirmative harm of the plaintiff.

Of course, negative as well as affirmative contracts will not be enforced, even after a *prima facie* case has been made, if unfairness would result. But to argue that because of such possible unfairness an injunction should never issue in negative contracts is practically to argue that no specific performance of affirmative contracts should ever be granted. There is some force in the suggestion that *Lumley v. Wagner* on its special facts exhibits a lack of mutuality, but this objection would be present only in a limited class of cases, and involves considerations independent of the general question as to enforcing negative agreements. To avoid the injustice apparent in *Montague v. Flockton*, the injunction should always be conditional on the plaintiff's continuing willingness to perform his part of the contract. It is interesting to note that, as the writer includes within the class wherein he would permit enforcement of negative covenants cases where the affirmative cause is still executory, though unbroken, he is obliged, in order to avoid the destruction of his distinction if later a breach should occur, to make the injunction conditional on the continuing performance of both parties. This gives the curious result that under the rule advocated the defendant could get out of performing his negative covenant by simply breaking his affirmative agreement also.

MIXED QUESTIONS OF LAW AND FACT; THE FALSE PASSPORTS CASE. —

A novel case, the importance of which has perhaps been overlooked, was decided by the King's Bench last year. *Rex v. Brailsford*, [1905] 2 K. B. 730. The defendants, A and B, had by combination obtained from the English Foreign Office a passport, which, though ostensibly for B, was in fact intended for C's use in Russia. An indictment was framed charging A and B with acts "tending to the public mischief." The court, as matter of law, held correct a ruling by the trial judge that the acts tended to public mischief. The dangers of the decision are emphasized in a recent article. *The False Passports Case*, by Herman Cohen, 22 L. Quar. Rev. 34 (Jan., 1906). It is urged that it is anomalous to withdraw from the jury an essential averment of the indictment, such as the lengthy argument shows this clause to be. A general verdict must of necessity always involve a question of law and fact; if the admitted facts are capable of two views, the jury must decide between them. An exception to the general rule existed formerly in libel cases, which afford an analogy to the present question. In such cases the judge used to say, "Prove what the defendant said, and I'll tell you whether he is guilty of libel"; to-day Lord Alverstone says, "Prove what the defendant did, and I'll tell you whether his acts constitute public mischief." Fox's Libel Act (1792), supposedly declaratory legislation, in giving a jury the power of bringing in a general verdict of guilty or not guilty upon the whole matter put in issue before them, made the procedure in libel similar to that in other crimes. The jury are as capable of judging whether certain acts tend to the public mischief as whether certain writing holds a man up to hatred, ridicule, or contempt. Though a judge in theory probably has the power to pass upon a new combination of circumstances, provided in so doing he follows principles already established, yet to attempt now

to exercise this power "would place the bench in an invidious position." The Lord Chief Justice is in effect creating a new indictable offense; this may well be regarded as a grave political danger. Finally, it is questioned whether the acts done did tend to public mischief in England. If the fraud became general, international complications might ensue; but the remedy should be by statute.

Perhaps the inquiry whether the acts done did tend to public mischief may be divided into four steps: (1) What acts were done, as a simple question of fact; (2) How great was the tendency towards public mischief; (3) How great a tendency is necessary to make the acts criminal within the law; (4) Is the tendency to public mischief found in the actual case as great as that necessary to make the acts criminal. Cf. *Mixed Questions of Law and Fact*, by Frederick Green, 15 HARV. L. REV. 271, 274. The first two questions are clearly of fact, while the third is a rule of law. The intense struggle over the jury's right to bring in a general verdict in libel cases is evidence of the practical importance of the question, who shall apply the law to the fact. As in the case of notice of dishonor of a bill of exchange, such acts as those under discussion become from time to time the subject of more specific legal rule or definition. Mr. Cohen seems right in his contention that if the decision of the Lord Chief Justice is correct, the latter is in fact, by way of judicial legislation, adding a new crime to the criminal calendar,—that of obtaining a passport intending it for the fraudulent use of another. The right of the judge so to do is unquestioned. 3 STEPHEN, HIST. CR. LAW 352; MARKBY, ELEMENTS, LAW, 5th ed., § 30; cf. 2 AUSTIN, JURISPRUDENCE 668. But the law created by such action must always be open to the specific objections of concreteness, incoherency, lack of comprehensiveness, and of its being *ex post facto* with regard to the case where it is first applied. 2 AUSTIN, JURISPRUDENCE 671; 2 STEPHEN, HIST. CR. LAW 359.

INTERNATIONAL LAW AS PART OF THE MUNICIPAL LAW.—Public international law, as distinguished from municipal law, is the body of rules which control the conduct of independent states in their relations to each other. It is a disputed question whether international law, as thus defined, can properly be called law, if Austin's statement be accepted that law is a command imposed by a sovereign and enforced by a physical sanction. See 18 HARV. L. REV. 476. Whatever view may be taken as to the nature of international law when it is applied to disputes between independent states, there is no question but that its rules are law in the strictest sense in the courts of both England and the United States in cases in which private litigants are interested. It has long been held in such cases that the principles of international law are a part of the common law, recognized and applied whenever necessary to work out the rights of private parties. A creditor's attachment against the ambassador of a foreign power is invalid at common law, because international law gives diplomatic representatives immunity from such proceedings. *Triquet v. Bath*, 3 Burr. 1478. It is a crime at common law for a subject to violate the duty of neutrality imposed on his sovereign by the rules of international law. *Gideon Henfield's Case*, Whart. St. Tr. 49. These cases and others illustrating the same principle are cited by Mr. J. Westlake in a recent article. *Is International Law a Part of the Law of England?*, 22 L. Quar. Rev. 14 (Jan., 1906).

Mr. Westlake points out that an exception to the general rule that courts administering municipal law will, in proper instances, apply the rules of international law, has been established in England within a year. See *West Rand Central Gold Mining Co. v. Rex*, [1905] 2 K. B. 391. In that case relief was denied to the plaintiff, a British subject, who alleged, through a petition of right, that an obligation rested upon the English Crown, as successor to the South African Republic, to pay him for gold commandeered by that republic before it was annexed to England. It seemed to be admitted that international law would have put England under a duty to repay the gold if it had belonged

to an alien, and the court based its decision on the ground that annexation was an act of state and the judiciary had no authority to question the validity of such acts. Mr. Westlake admits the correctness of the constitutional principle that in England executive acts are not subject to review by the courts, but he points out that the court would not have been attacking the validity of the act of state by granting the petition. The court should have recognized the validity of the annexation, but should have then proceeded to decide what consequences followed the act. By holding that the new government became successor to the obligations of the old, the court would not have encroached upon the prerogatives of the Crown, as the state department had made no pronouncement on the subject. The writer traces the growth of the doctrine which resulted in the decision under discussion, and his investigations show that the court made an unfortunate application of a *dictum* in an earlier English case. The English law, as it now stands, seems to be in opposition to that of this country. The United States Supreme Court has no authority to interfere with executive acts as long as they are constitutional, yet it does not hesitate to assume jurisdiction over cases involving the consequences of those acts, and to apply the rules of international law, even though the United States is one of the parties whose rights are involved. See *United States v. Percheman*, 7 Pet. (U. S.) 51.

THE LAW RELATING TO "TIED HOUSES."—An English writer in a recent article raises the question whether an agreement by the owner of a public house to purchase all beer sold therein from a particular brewer is binding upon a grantee of the premises who takes with notice of this agreement. *The Law Relating to "Tied Houses,"* 50 Sol. J. 152 (Jan. 6, 1906). In the leading case upon the general topic, *Tulk v. Moxhay* (2 Ph. 774), a covenant by a grantee not to build upon land conveyed, made for the benefit of adjoining property, was held to bind a subsequent purchaser with notice. The writer sets forth two possible theories as to the doctrine of this case:—(1) that it depends on contract and is a burden on the conscience of the assignee; and (2) that it creates an equitable burden on the land analogous to a negative easement. A deliberate choice is made in favor of the latter of these views, as being the one adopted by the later English authorities. See *London & South-Western Railway Co. v. Gomm*, 20 Ch. Div. 562, 583; *Formby v. Barker*, [1903] 2 Ch. 539, 552. Particular emphasis is laid upon the analogy of the negative easement, which is regarded as perfectly applicable, with the one exception that a restrictive covenant will not follow the land in equity in the absence of notice to the purchaser, whereas a negative easement is binding irrespective of notice. Except, therefore, where a restrictive covenant as to the use of land would run with the land at law, the contention is that no equitable burden is imposed upon a purchaser with notice where the relation of dominant and servient tenements did not subsist as the basis of the original restrictive agreement. Since an agreement by the owner of a public house to buy beer from a particular brewer is for the benefit of an individual or his business, and not for the benefit of a dominant estate, the conclusion is reached that no burden follows the premises into the hands of a purchaser with notice. The writer confesses the existence of substantial authority to the contrary, but submits that the strong *dicta* of later decisions point to an overthrow of these earlier cases. Cf. *John Brothers v. Holmes*, [1900] 1 Ch. 188; *Noakes v. Rice*, [1902] A. C. 32, 35, 36.

Doubt is cast upon the conclusion here reached by the weakness of the premise, for issue must be taken with the contention that an equitable burden arises only where the analogy of common law easements applies. The doctrine seems to be based rather on the broad equitable principle that where an agreement is made touching property which equity will specifically enforce, an equity is attached to that property which follows it into the hands of a purchaser with notice. For a discussion of the principles involved, see 5 HARV. L. REV. 274; 17 HARV. L. REV. 174, 415.

- ACCEPTANCE OF AN OFFER BY POST. *Priyanath Sen*. Approving the discussion in 17 HARV. L. REV. 342, and containing an excellent treatment of the topic. 3 Calcutta L. J. 1 n.
- ARE A KNOWLEDGE OF AN OFFER AND INTENT TO ACCEPT ESSENTIAL TO THE RECOVERY OF A REWARD OFFERED? *Hugh Evander Willis*. Maintaining that a knowledge of the offer and intent to accept are essential to recover a reward, since the right arises out of a contractual relation. 62 Cent. L. J. 105.
- BAR IN FRANCE, THE. PART I. *Edward S. Cox-Sinclair*. A brief history of the French Bar. 31 L. Mag. & Rev. 171.
- BREACH IN THE DOCTRINE OF RENVOI, A. *Oliver E. Bodington*. Discussing a French case of 21st Dec., 1905, which, following an English Chancery case of 1903, has overruled the rule of renvoi regarding succession to personality. 120 Law T. 237.
- CHANGES IN THE LAW OF HUSBAND AND WIFE. *Alfred Fellows*. 22 L. Quar. Rev. 64.
- FALSE PASSPORTS CASE, THE. *Herman Cohen*. 22 L. Quar. Rev. 34. See *supra*.
- FORTY PROPOSITIONS IN THE LAW OF NEUTRALITY. *T. Baty*. 31 L. Mag. & Rev. 160.
- ELEVENTH AMENDMENT TO THE CONSTITUTION, THE. *George C. Lay*. Disapproving on historical grounds the position of the Supreme Court of the United States in interpreting the Eleventh Amendment to the Constitution. 6 (The) Brief 1. Cf. 17 HARV. L. REV. 483.
- EXAMINATIONS BEFORE TRIAL TO FRAME PLEADINGS. I. *Raymond D. Thurber*. 4 Bench & Bar 11.
- GROWTH OF HAGUE IDEALS, THE. *Hannis Taylor*. Favoring the approval of the arbitration treaties in the form not requiring each agreement for arbitration to be submitted to the Senate. 40 Am. L. Rev. 1. Cf. 19 HARV. L. REV. 69.
- INJUNCTIONS AGAINST STRIKES. *James Wallace Bryan*. Analyzing the instances where the officers of a labor union will be enjoined from ordering a strike. 40 Am. L. Rev. 42.
- IS INTERNATIONAL LAW A PART OF THE LAW OF ENGLAND? *J. Westlake*. 22 L. Quar. Rev. 14. See *supra*.
- LAW OF BANK CHECKS, A PRACTICAL SERIES ON THE. IV., NEGOTIATION. *Anon.* 23 Bank. L. J. 95.
- LAW RELATING TO "TIED HOUSES, THE." *Anon.* 50 Sol. J. 152. See *supra*.
- MUNICIPAL BENEFIT AND PENSION FUNDS. *Glenda Burke Slaymaker*. An elaborate digest of cases bearing upon the constitutionality and effect of statutes requiring municipalities to pension employees. 62 Cent. L. J. 85.
- MUNICIPAL ORDINANCES AND CONTRACTS FOR THE REMOVAL AND DISPOSITION OF GARBAGE, ETC., involving their Reasonableness, Restraint of Trade and Monopoly, and Interference with Property and Personal Rights. *Eugene M. McQuillin*. Extensive collection of authorities. 62 Cent. L. J. 64.
- NOTES ON MAINE'S "ANCIENT LAW." *Frederick Pollock*. 22 L. Quar. Rev. 73.
- ORIGIN OF ENGLISH LAND TENURES. *Frederick C. Bryan*. Tracing English tenures to a Roman law origin, and rejecting the view that English tenures sprang from German institutions or were developed on German principles. 40 Am. L. Rev. 9.
- POWER OF CONGRESS TO REGULATE CORPORATIONS. *Chauncy J. Hamlin*. 6 (The) Brief 14.
- PROVINCE OF THE JUDGE AND OF THE JURY, THE. II. *G. Glover Alexander*. Dealing with two ancient trials, those of Throckmorton and of Lillburn. 31 L. Mag. & Rev. 184.
- SHOULD THE GRAND JURY SYSTEM BE ABOLISHED? *George Lawyer*. Nine-page argument against grand jury system, partly historical and arguing that *cessante ratione legis cessat et ipsa lex*. 15 Yale L. J. 178.
- SPECIFIC PERFORMANCE BY INJUNCTION. *Clarence D. Ashley*. 6 Columbia L. Rev. 82. See *supra*.
- THEORY AND DOCTRINE OF TORT. *Melville M. Bigelow*. 18 Green Bag 64.
- WRITTEN AND UNWRITTEN CONSTITUTIONS IN THE UNITED STATES. *Emilin McClain*. 6 Columbia L. Rev. 69.

II. BOOK REVIEWS.

POMEROY'S EQUITY JURISPRUDENCE. In four volumes. By John Norton Pomeroy. Third Edition, annotated and much enlarged, and supplemented by a Treatise on Equitable Remedies, in two volumes, by John Norton Pomeroy, Jr. San Francisco: Bancroft-Whitney Company. 1905. pp. lviii, 1-859; xii, 861-1806; xv, 1807-2626; vii, 2627-3525. 8vo.

A TREATISE ON EQUITABLE REMEDIES. In two volumes. By John Norton Pomeroy, Jr. San Francisco: Bancroft-Whitney Company. 1905, 1906. pp. x, 1-932; xxvi, 950-1875. 8vo.

The first edition of this standard treatise was issued in 1881, in three volumes, and the second edition in 1892, after the death of the author, in the same number of volumes. The present edition appears in four volumes, accompanied by a new work on Equitable Remedies, by John Norton Pomeroy, Jr., in two additional volumes.

It is difficult to overestimate the importance of this work, or the effect that it has had upon the development of equity jurisprudence in this country. At the time of its appearance in 1881, few of the states had any large or consistent body of equity precedents in their reported cases. The author in his preface shows the danger, in the states adopting the code system, of the gradual loss of equitable doctrines because of the abandonment of the distinction between legal and equitable remedies, upon which so many of the equitable doctrines rest. The danger was hardly less in common law states, like Massachusetts, because an understanding of equity depends more upon the acquiring of the equitable point of view than upon the learning of any number of rules; and it was long after the belated grant of full equity jurisdiction to the courts that Massachusetts judges and lawyers learned to divest themselves of their common law ideas, and to look at equity questions from the equity standpoint. See 5 L. Quar. Rev. (1889) 370. The hopes of the author have undoubtedly been realized, and his clear and accurate statements of the principles of equity have been of the greatest service in preventing the degeneration of equity and the confusion of legal and equitable ideas in this country. The work has been cited and relied on by the courts in innumerable cases, and is certainly the greatest work on the subject ever produced.

Pomeroy's Equity Jurisprudence has a deserved reputation for accuracy and clearness in its statement of theory, and there is very little room for adverse criticism in that respect. The present writer ventures to suggest, however, that the learned author was not successful in analyzing certain equitable doctrines and in making clear their true simplicity.

The most conspicuous example of this is found in the chapter on equitable liens (§§ 1233-1267). In the class of equitable liens, so called, created by an agreement that property shall stand as security for a debt, the jurisdiction of equity is founded upon specific performance, which equity enforces because of the plain inadequacy of any legal remedy. Equity will order a sale of the property to satisfy the debt, as the only effectual means of enforcing the agreement that the property shall stand as security. This right of specific performance is, upon ordinary equity doctrines, enforceable against all subsequent owners of the property, other than innocent purchasers for value. The only difference between the right of specific performance in these cases, and the right in the case of a contract for the sale of lands, is the difference resulting from the purpose of the contract to be enforced. In the other cases treated under the head of "equitable liens," the basis of the jurisdiction is either specific performance or some other established equitable right; and the effect of such equitable right against subsequent owners of the property is simply an illustration of the general rule of equity. It is submitted that the foregoing is the full explanation of the theory, and that the reliance of the learned author upon the maxim "Equity regards as done that which ought to be done" (§ 1235) is as unnecessary as his derivation of equitable liens from the *hypotheca* of the Roman law (§ 1233, note 3) is incorrect.

In other words, what is called by the misleading term "equitable lien" is really a compound of some equitable right, usually of specific performance, to have a claim paid out of property, plus the general equity doctrine as to the enforcement of equities against volunteers or persons taking with notice. The basic equitable right should be treated under the appropriate topic, and the effect upon subsequent owners of the property should be treated under the general topic of notice or the rights of purchasers. To devote a chapter to "equitable liens," without an adequate analysis of the theory, leads the student to believe that the cases discussed in that chapter rest upon some special and even mysterious foundation, instead of being merely instances of the application of elementary rules. That the danger just pointed out is a real one, may be seen by a reference to the opinion in *Hazen v. Matthews* (184 Mass. 388), where a learned and able court was led, in considering the similar doctrine commonly called "equitable easement," to forget that the question was really one of specific performance, and to argue from the false analogy of legal easements; a fact which the court has since admitted. See *Bailey v. Agawam National Bank*, 76 N. E. Rep. 449 (Mass., 1906).

Perhaps the difficulty with these cases of so-called equitable liens has been partly caused by the narrow view taken by some English judges of the scope of specific performance. Lord Selborne, for example, limited the term to the enforcement of contracts for the execution of some further instrument, like a deed, which instrument is finally to define the rights of the parties. The specific enforcement of duties arising from other contracts, he said, was not properly called specific performance. See *Wolverhampton, etc., Railway Co. v. London, etc., Railway Co.*, L. R. 16 Eq. 433. See also *Tailby v. Official Receiver*, 13 App. Cas. 523. The result of a contract, not that legal security shall be given, but that certain property shall stand as security, must be explained, by a person adopting the view of Lord Selborne, upon some principle other than that of specific performance. The favorite explanation is to assume some unnamed and perhaps imperfect equitable duty to arise, then to apply the maxim "Equity regards as done that which ought to be done," and to say that the result is an equitable lien, which may be foreclosed, or, to put it more exactly, enforced, by a bill in equity. But it is submitted that this reasoning is artificial, and unnecessary for the explanation of the doctrine.

These criticisms, however, are quite debatable, and are in one sense minor criticisms, since they do not necessarily involve any difference in the practical result of the doctrine. The text is so good, and the editing so well done, that the present writer would not be understood as trying to detract from the work any of the credit to which it is so justly entitled.

The editor has been, perhaps, too conscientious in separating the author's notes from his own, and in making no material changes in the original text. That text was generally so sound and comprehensive in its statements that there has been little need of change; but the existence of two sets of notes is by no means an unmixed blessing. Other things being equal, a new law book is better than an old one brought down to date. In a new book the text is written with the latest development of the law in mind, the notes bear the proper relation to the text, and the arrangement of the page is such as to present the prominent features of the subject at first sight. In an old book which has passed through many editions the original text is retained, unless it has become absolutely wrong; and in many cases the present state of the law can be found only by examining the cases accumulated in a mass of notes by successive editors. In Pomeroy's Equity this has not become a great fault; but a revision and consolidation of the notes would, it is believed, have improved the book for use. Nowadays we use encyclopedias and general digests to find the cases which we cite to the court as authorities, and the citation of text-books as authorities is rapidly becoming obsolete. A text-book must survive, if at all, by virtue of its strength of reasoning, power of analysis, and clearness of statement, and it is submitted that no text is too sacred to be altered so as to present, in the simplest and clearest way possible, the full product of the latest discussions and investigations.

The addition of the two volumes of "Equitable Remedies," by John Norton Pomeroy, Jr., appears to be a business mistake. These volumes restate and amplify the doctrines laid down in the fourth volume of the "Equity Jurisprudence." The purchaser should not be compelled to buy the same thing twice. Either the two volumes of "Equitable Remedies" should have been published separately, or the treatment of equitable remedies contained in the fourth volume of the "Equity Jurisprudence" should have been omitted.

Despite the criticisms that have been ventured, the work remains, what it has been for twenty-five years, one of the few masterpieces of our legal literature.

H. T. L.

CONDITIONAL AND FUTURE INTERESTS, AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS. By Albert Martin Kales. Chicago: Callaghan and Company. 1905. pp. xlv, 753. 8vo.

The appearance of numerous and exhaustive digests and encyclopedias of general law has during the past few years driven the ordinary text-book from its place as a compendium of law or collection of decisions. It is rare, indeed, that a text-book can, like Wigmore's *Evidence*, compete on such lines with the encyclopedias. To this, perhaps, is due the fact that writers of text-books are turning more and more to highly specialized branches of the law and to microscopic analysis of legal principles and decisions. Kales' *Future Interests* is a striking example of a book of this type. The author has treated the law of future interests in Illinois from the standpoint of one who is fully as much interested in what the law should be as in the actual state of the law.

The avowed purpose of Professor Kales has been to educate the bar of Illinois to proper appreciation of Professor Gray's two works on the Rule against Perpetuities and Restraints on Alienation. Whether the book will have the hoped-for effect, to any great extent, may well be doubted. That it will be useful and used by the bar of Illinois seems, however, to be certain. The author has taken all the law of Illinois on future interests and subjected it to an exhaustive analysis, examining all the important decisions in detail and discussing many disputed or undecided questions of local law, the solution of which still lies with the Supreme Court of Illinois. As this is almost entirely new ground, and many of the questions discussed are of great importance, the discussions are exceedingly useful, particularly that concerning the extent of the landlord's right of entry on forfeiting a lease for breach of condition. See §§ 41-61. Another instance of valuable and interesting discussion appears in §§ 137-156, taking up the validity of shifting interests by deed in Illinois. In point of fact, Professor Kales' book is full of meat to the practicing lawyer, who will find many important questions skilfully briefed for use in argument.

The law of real property, however, demands, more than any other branch of the law, settled rules and decisions. It is generally more important to the lawyer who must pass in his opinion upon real estate titles that there shall be no disturbing questions concerning the title than that the law shall be a harmonious whole or that all decisions shall be correct. Professor Kales does not, perhaps, give this consideration sufficient weight. Repeatedly he argues that certain seemingly well-settled doctrines should be overthrown. The doctrine of *Gebhardt v. Reeves* (75 Ill. 301) is a case in point. It is doubtful if any Illinois lawyer would hesitate to advise a client that on the vacation of an accurate statutory dedication, the fee reverts to the dedicator or his heirs. The Supreme Court has always assumed this to be the law. See *Village of Hyde Park v. Borden*, 94 Ill. 26. In fact, the great number of decisions in which the Supreme Court has evaded the rule of *Gebhardt v. Reeves* all by implication admit that it is settled law. Under these circumstances it seems waste labor for Professor Kales to attack the doctrine, and although the argument is interesting enough from an academic standpoint, its usefulness may well be doubted. See §§ 4-10.

Another discussion which is also of a doubtful value is the attack on the case of *Pollock v. Maison* (41 Ill. 516). As a practical question, this case is good

law. Were it overruled and the mortgagee whose claim is barred allowed to maintain ejectment, as contended for by Professor Kales, there can be little doubt that the legislature would not long allow Section 11 of the Illinois Statute of Limitations to be thus nullified.

Except, however, this possible leaning toward useless discussion of settled questions, the book offers little room for adverse criticism. Occasionally inconsistencies may be pointed out; for example, in § 2 A it is stated in the text that entry is necessary before action on breach of condition subsequent, while § 30 A, which is referred to in the note, lays down an exactly opposite rule. So, too, in certain instances distinctions are made which would be difficult to apply as practical working rules. Such are the distinctions taken in § 260 as to what is necessary to make a purchaser *dominus* of the property. As a whole, however, the book is thoughtful, scholarly, and accurate. As the ground which it covers is entirely new, it is remarkable that in general it should present so few points of attack. It has further the added advantage of notes which contain a full collection of all the Illinois decisions on the points involved. This alone would be sufficient to give it great practical value to every Illinois lawyer, while the analysis of the decisions in the text raise its usefulness far above that of even the most complete digest.

R. M.

A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES. By George B. Clementson. St. Paul, Minn.: West Publishing Co. 1905. pp. lxi, 35. 8vo.

"At no period in its history has the petit jury been noted for modesty or diffidence, when not liable to be called to account"; and at this date, when the attain — that ancient instrument for effectually concentrating the minds of the jurors upon the facts of the case rather than upon the respective conditions of the parties — is no more, the practicing lawyer, especially if he appear for defendants in damage suits, must welcome any manual that clearly defines his privileges with respect to the only means of controlling the sympathy or prejudice of juries, namely, Special Interrogatories and the Special Verdict.

Such a manual Mr. Clementson has produced. After a delightful historical introduction, founded in part upon the treatise by the late Professor Thayer, comes a discussion of Special Interrogatories. The cases in which they may be submitted, their preparation, form, and requisites, are intelligently set forth, followed by an exposition of the effect of the responses of the jury. The rights of the respective parties and the prerogatives of the court at the various stages of the trial are fully explained; and for almost no proposition is one required to accept the *ipse dixit* of the author, the citation of authorities being commendably complete. The same plan is adopted in the treatment of Special Verdicts. A chapter on Special Verdicts in Criminal Cases completes the work. An appendix with a summary of all the present statutes on the subject, a good index, and a table of cases cited, make the volume convenient for ready reference.

Although the plan of the work is well conceived, the execution is somewhat faulty. For example, the different subdivisions overlap so that in many instances the same legal proposition is adduced and the same cases are cited under several different topics, with the result that one feels that the work might have been accomplished in shorter compass. The book professes to be only a manual, and the subject is not one which lends itself readily to philosophical treatment. It is perhaps for these reasons that the author has contented himself with presenting the law as it exists, in a treatise which he calls "a collection of fragments," and refrained from advancing his own theories. The statutes and decisions, however, differ so materially in many important respects that some well reasoned scheme for future legislation might opportunely have been suggested. Yet, though to the student these faults seem serious, to the practitioner they are slight; and it is for the benefit of the latter that the manual is published.

E. M. M.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XX. YEAR BOOKS OF EDWARD II. Vol. III.: 3 Edward II. A.D. 1309-1310. Edited for the Selden Society by F. W. Maitland. London: Bernard Quaritch. 1905. pp. xcv, 244.

The Selden Society for the year 1905 sends us another volume of the Year Books; and it is most gratifying to find that this trustworthy and authoritative edition is proceeding without interruption. The whole volume is filled with the cases of a single year, and even then the year is not completed. The cases are not very interesting in themselves. They involve almost without exception obscure points in the law of real estate, so long obsolete that no one but an antiquarian can even understand the meaning of the points under discussion. But if we are not greatly edified by the discussions of the ancient men of law, we may turn to Professor Maitland's introduction, and there find pleasant and profitable instruction. He has again placed legal scholarship under a debt to him for a clear, interesting, and absolutely convincing account of the manuscripts and their probable origin. Further investigation has confirmed his earlier belief that there is not a single original report of the decisions, but that the manuscripts are simply collections, by various hands, of notes taken in court by the apprentices or the younger barristers. A most careful comparison of the same case in different manuscripts with the official roll makes this conclusion irresistible. The books therefore are not always correct, though we can often check them by the roll; and they must be used with some care by the legal historian. But, for all that, they are of inestimable value, not only to the student of English law, but also to the historian of the English people. "If not all of the men who compiled these books were heaven-born jurists, they were not the less human on that account, and their notes and their queries, their mistakes and their perplexities, may teach us more of English law and English life than we could learn from polished treatises." What, for instance, could be more enlightening as to the real Edward I. than this anecdote which Chief Justice Bereford tells, and the lively youth whose manuscript is called Y repeats. Isabel Countess of Albemarle had been summoned to parliament to answer the king "touching what should be objected against her." The king himself took his seat in parliament. Isabel's lawyer then demurred to the writ as too general, and Sir Ralph Hengham sustained the objection. "Then arose the king, who was very wise, and said: 'I have nothing to do with your disputations, but, God's blood! you shall give me a good writ before you arise hence.'" A touch like this is worth a volume of writs *sur disseisin de quibus* or *sur disseisin in the per.*

J. H. B.

ANCIENT LAW. Its Connection with the Early History of Society and its Relation to Modern Ideas. By Sir Henry Sumner Maine. With Introduction and Notes by Sir Frederick Pollock. London: John Murray. 1906. pp. xxiv, 428. 8vo.

Maine's Ancient Law was originally published nearly half a century ago, immediately after Mill's Essay on Liberty, immediately before Austin's Province of Jurisprudence Determined, in the full tide of triumphant Benthamism. It speaks well for Maine's essential qualities, for his scholarly acumen, his common sense, and his power of expression, that within the last few months no less than three editions of his now classic work have been put on the market by London publishers. The one under review is extremely well printed and enriched with notes by Maine's successor in the chair of Comparative Jurisprudence at Oxford, Sir Frederick Pollock; the only complaint one can make against the publishers is that the index is quite inadequate.

No better editor could be found for Ancient Law than Sir Frederick Pollock, and there is little cause to find fault with the twenty substantial notes he has appended to Maine's chapters. Several small points may, however, be noticed. The claim that Maine was the first to use Homer as a source of information on archaic legal procedure is not correct; more than a century earlier Vico covered this subject at some length. The same writer is left out of account when we

are told that "Montesquieu was the first of the moderns to proclaim that a nation's institutions are part of its history" (p. 174). In dealing with Edward I.'s Statute of Wales it would have been better to explain that the king's object was an administrative adjustment rather than a question of title. Maine was undoubtedly mistaken in his exposition of Rousseau's theory as to the state of nature: his editor might have done better to illustrate the point by quotations, the following being suggested: "The passage from a condition of nature to a civil condition has produced in man a very remarkable change, in substituting justice for instinct as his rule of conduct, and in lending to his actions morality which previously they lacked" (Rousseau, *Homme Civil*).

Both author and editor have much that is valuable to say on the benefit that the historian may derive from the study of law, and the lawyer from the study of history.

R. M. J.

PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION. Held at Chicago, Ill., December 28 to 30, 1904. Lancaster, Pa.: Wickersham Press. 1905. pp. 249. 8vo.

The work of this newly organized association at its first annual meeting was divided among standing committees, each of which was entrusted with consideration of one of the following topics: Comparative Legislation; Comparative Jurisprudence; International Law and Diplomacy; Administration; Constitutional Law; Politics and Political Theory. The volume of reports contains an unusually large number of valuable essays and discussions concerning public questions of present-day interest. Among the papers dealing more specially with legal problems may be mentioned: The Relation of the Executive to the Legislative Power, by James T. Young; The Beginnings of War, by Theodore S. Woolsey; Unneutral Service, by G. G. Wilson; Contraband of War, by Henry Pratt Judson; Government Interference with Industrial Combinations, by E. B. Whitney; The Regulation of Railway Rates, by Martin A. Knapp; Tendencies in the Law of Taxation of Railways, by H. C. Adams.

CRIMINAL RESPONSIBILITY. By Charles Mercier. Oxford: At the Clarendon Press. 1905. pp. 232. 8vo.

This is a little essay by an earnest and intelligent physician on an extremely difficult and intricate portion of the criminal law. The author does not make the mistake, almost universal among physicians who enter this field, of confounding insanity and irresponsibility; he seeks for responsibility where it belongs, in blameworthiness rather than in normal health. But his ignorance of law leads him to the most astonishing generalizations. For instance, he judges "wrong" by "the magnitude of the benefit gained by the actor in proportion to the harm suffered by the victim; the greater this proportion, the less the wrong" (page 72). Responsibility, on the other hand, depends upon the selfishness of the motive. "He must desire primarily to obtain his own gratification by means of the act" (page 155). "If the things stolen are given away, as they sometimes are, to strangers or tramps, and if we cannot find a motive of causing pain or injury to the person robbed, we conclude that, for an injurious act which displays no motive of self-gratification, no responsibility is incurred" (page 156). A test of responsibility which would leave Robin Hood and the Chicago Anarchists unpunished while it would hold accountable the man who selfishly defends himself or his property, is a test which is obviously of no use to lawyers, however interesting the controversy into which it may lead "alienists." Mr. Mercier provides in a way for self-defense by treating it as a case of *provocation*, but defense of property appears to be beneath his notice.

J. H. B.

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RAILWAY RATE REGULATION.

RAILWAY rate regulation is now the subject of a brilliant debate in the Senate, a debate largely confined to legal questions, chief of which is whether or not Congress can give a commission the power to make railroad rates without giving interested parties a day in court to determine whether such rates are legal and binding. Senators Spooner, Knox, Bailey, and Foraker have spoken with learning, clearness, and power. They all agree that the Hepburn Bill must be amended to give the courts an opportunity to review the rates made by the commission, or there is great danger that any legislation may be declared unconstitutional, on the ground that it provides for taking from an owner the income of his property by the mere fiat of a commission, without giving him any day in court, any "due process" of law, within the Constitution.

President Hadley, in his able discussion of the subject in the Boston Evening Transcript of April, 1905, touched upon the necessity of being conservative and remembering the rule "more haste, less speed" in legislation of this character. His conclusion was:

"But while Congress could undoubtedly increase the powers of the Interstate Commerce Commission if it wanted to, and that without any serious financial damage to the railroads, it is improbable that such action would result in much good to the public."

More recently, President Hadley is reported to have taken substantially the same position, but to think that the public demand is such that some legislation must be enacted.

What are the points to be kept in mind in considering this subject?

1. Even the Interstate Commerce Commission concedes that our railroad rates are not too high; that this issue is "obsolete." From 1887 to the present time but few cases have been brought before the Commission on this subject, and in but a single instance has one of them been carried to the Supreme Court of the United States. Either the railroads have complied with the suggestions or decisions of the Commission, or the lower federal courts have compelled them so to do, or have overruled the Commission for its mistakes. It follows that neither producers nor consumers have any grievance here, because the rates in this country are so much lower than those in any other as to show that the utmost possible commercial freedom is advisable in dealing with railroads.

2. Our rate legislation grew out of unjust discriminations. The publicity given to railroad rates, contracts, and arrangements by the Interstate Commerce Act and the Elkins Law, making the shipper as well as the carrier guilty for violations of the Interstate Commerce Act, have largely ended such discriminations. Neither publicity nor an act like the Elkins Law can instantly end such abuses; but the experience of England shows that patience and a reasonable enforcement of our statutes will end unjust discriminations and preferences by rebates, or otherwise.

3. The Interstate Commerce Act should be amended so as to extend its provisions to all common carriers engaged in interstate commerce, and to all rates affecting interstate commerce, that thereby carriers and artifices that now escape the law may be made subject to its regulations. It should not be possible for manufacturing corporations to organize their switches into an independent railroad, get an unjust division of the rate with some railroad company, and then snap their fingers at rate regulation aimed to prevent unjust discrimination, thereby obtaining an undue preference or advantage over competitors. Nor should it be possible for independent car lines, or other common carriers, to make excessive charges for icing fruits or meats, or rendering other services to producers, and then to escape complaints because they claim they are not within the provisions of the law. All common carriers, or quasi common carriers, and all rates affecting interstate commerce, from the time it starts until it stops, should come within the provisions of the law.

4. The Commission having the power to require that the rates

shall be reasonable, and shall not unjustly discriminate or prefer one over another, and the Supreme Court so construing the law as to prevent the common carrier from getting any advantage to itself out of being a dealer in commodities, it follows that the law as it stands to-day, if enforced, will necessarily end in divorcing the carrier from all other business, so that further provisions upon this subject are unnecessary.

5. The Commission is a grand jury or district attorney to investigate, an executive to enforce the law, and is clothed with judicial functions in hearing and determining cases that come before it upon complaints. Because of these warring and opposing functions, which all writers have agreed for more than a century should not be united in the same body, the Commission should not be given the power to fix any rate without giving the courts the power to review the Commission's action. In the courts we object to trying a case before a petit jury composed of grand jurors who found the indictment, or before a judge who was the district attorney who procured the indictment, and in like manner interested parties should not be compelled to submit to a final decision by any body of men discharging different and opposing functions, as does the Interstate Commerce Commission. The natural zeal of honest men to find that their charges are well founded explains the numerous rulings of the Commission which have been overthrown by the courts because they have been unfounded in fact or law. If so able a Commission, after long experience, is so frequently overruled as ours has been, it must be apparent, unless the courts themselves are at fault in their decisions, that they should have the power to review the action of the Commission.

6. A review of the decisions of the courts shows that they have not been at fault in overruling the Commission. Of the cases coming before the Commission, but a very small percentage have come before the courts, because in the vast majority of the cases coming before the Commission the railroads have either easily shown they were not at fault or have submitted to the decision of the Commission without going to the courts. In the small percentage of cases which the railroads have taken to the courts because they were dissatisfied with the rulings of the Commission upon the facts or upon the law, they have usually succeeded, because the Commission has been in error. The courts have not laid down any new or startling doctrine in reaching their conclu-

sion, but instead have given the same construction to our Act given to similar provisions of their statute by the English courts; we having borrowed our Act largely from the English acts on the same subject. Where English decisions have not furnished the rule, because the question was an original one, the courts have examined the Act to see if it gave the Commission authority to do what it did. As the Commission is not a court, and due process of law, within the Constitutional Amendments, requires that every person shall have a legal day in court before his property, or the income of his property, can be taken from him, it must be clear that Congress cannot enact legislation that can deprive a person of that day in court without thereby showing such a plain intent to violate the Constitution itself as to require the courts to pronounce such legislation unconstitutional and void.

7. The silent attack upon our courts for merely discharging their constitutional duties is but a continuation of the affirmative and aggressive attack upon them in 1896 for doing the same thing. As our courts are the very safeguards of our institutions, all charges that they are owned by corporations, or that they must be ignored by the citizen who would obtain justice, are unfounded, or should be made the basis of an impeachment of the judge of whom they are true.

8. In the power to "regulate" interstate commerce Congress has no power to fix charges upon services or for materials. It only has the power to prevent unjust or illegal exactions or discriminations; hence it can give no greater power to the Commission.

An intelligent study of the problem of regulating railway rates cannot ignore the experience of England. In other European countries, so large a proportion of the railways are owned and operated by the nations, which rigorously regulate the rates upon those not so owned, and the circumstances and conditions are so dissimilar, that little light is obtained from their experience. In England, however, the railways are owned by corporations, as is the case in our own country. England was a country abundantly supplied with means of transportation by water at the time railways were introduced, and therefore railways had to win their freight traffic by competition with water carriers upon the seas and upon her inland rivers and canals. The dense population of England, and the enormous extent of her manufactures, enable a comparatively small number of miles of railroad to do an enormous passenger and freight business for one of the richest nations in the

world. The English Parliament and the English courts are hampered by no constitutional restrictions, and therefore each has free play to regulate railway rates to the fullest extent deemed compatible with the true interests of the nation, or justice to investors in railway stocks and securities. Under such circumstances, we would naturally expect to find that water competition, regulation of rates by the English Government, and a dense traffic on comparatively few miles of railroad, would all together result in lower freight rates and more satisfactory conditions to producers and consumers than those found in our own country. Does the experience of England indicate that it will be wise to give the largest possible powers to our Interstate Commerce Commission, that that Commission may, so far as possible, make railway rates on interstate commerce whenever complaint is made to it? Does the experience of England indicate that it would be wise to make our Interstate Commerce Commission as independent as possible of the courts, and any right of review by the courts, so far as that can be done under our Constitution? Let the facts touching England's experience with railway rate regulation be the answer to these questions, and a valuable object lesson in their consideration.

Our present Interstate Commerce Act was largely borrowed from England, and our Supreme Court has followed the decisions of the English courts in construing our Act, so far as those decisions were applicable. It must be clear, then, that we shall get an insight into our own problem by studying that of England. And we shall best study the English railway rate problem and experience by taking as our guide a gentleman who is as disinterested and high an authority in England upon this subject as is President Hadley in our own country; I mean Mr. Acworth, author of the "Elements of Railway Economics," the most informing work upon this subject that can be had in small compass, and a worthy companion to President Hadley's work on "Railroad Transportation."

Mr. Acworth, as a member of the International Railway Congress, happened to be in this country as a delegate for the British Government at the time the Interstate Commerce Committee of the Senate was engaged in its very thorough inquiry into this subject, and he gave the Committee a clear statement as to the legislation and experience of England. After reviewing the various English acts, he states the net result of them all to be:

1. A "statutory maximum, which, of course, is not really much of a check . . . , is of no value except to local traffic for short distances and small amounts."

2. There shall be no "undue preference to one trader, or to one district, over another."

3. "The railway company must make no increase except for good cause, if anybody objects."

These results, added to rate publicity, have finally extinguished secret rebates in England, in the judgment of Mr. Acworth. It is noticeable, however, to quote Mr. Acworth, that under these acts "nobody has power to reduce a rate. The only thing they can do is to prevent a rate being increased."

Mr. Acworth's further discussion of this problem with the Committee was so candid, and is so informing, that I here quote from that discussion bodily two or three excerpts to show the judgment of an expert in England:

"THE CHAIRMAN. What, in your opinion, is the effect of governmental regulation of rates?

"MR. ACWORTH. In England I think there is no question whatever but that the enforcement of the law with respect to undue preference has tended to prevent concessions that would otherwise have been given. The railway people have been afraid that the courts would regard as similar, circumstances which they regarded as dissimilar, and therefore they have hesitated to make a reduction that they otherwise would have made, presumably with profit to themselves and to the traders. Whether the gain to the individual who is relieved, so to speak, from competition counterbalances the injury to the community from the keeping up of the average rate, I do not know. Since it has been decided that no rate can be put up once it has been put down, without appeal to the law courts, the railway companies have practically arrived at the conclusion that they will not put them down because they do not know whether they will have an opportunity to put them up again.

"SENATOR CULLOM. Do you think it works to the advantage of the people that the railways will not put the rates down for fear they will not get a chance to put them up again?

"MR. ACWORTH. Personally I have no doubt it does not. It is fair to remember always that it may protect the weaker in commercial strife. It is rather hard on the weaker man to be crowded to the wall by a wholesale concern in any walk of life. But if it be true in ordinary business that, on the whole, the public gains by the wholesaling method, it is probably true in railway business also. . . .

"THE CHAIRMAN. You think that dividing responsibility impairs the

administrative power of the officials of the roads as well as the service they render to the public?

"MR. ACWORTH. From the operating point of view, I do not think our railways have been sufficiently interfered with to prevent them developing the goodness of the service. But as to rate making, I have no doubt that the interference of Parliament, the courts, and the executive has all tended to stereotype and keep rates at an unnecessarily high level.

"THE CHAIRMAN. Would you say that, on the whole, the power to make rates generally and primarily should be left to the railroads and to the free play of the forces of the business world?

"MR. ACWORTH. Speaking as an individual student, I have no doubt that that is the process that will arrive at the best results for the community, with this exception: that I fully think it is necessary that the community in some way should interfere to protect all customers from unfair treatment.

"THE CHAIRMAN. You think that the power should reside somewhere to correct excessive and extortionate rates by summary and proper proceedings?

"MR. ACWORTH. I am not sure that I should go so far as to say excessive rates regarded as excessive in themselves. I am myself inclined to think that excessive rates will correct themselves. The wise men will discover that it does not pay to charge excessive rates. But I think the law should interfere to prevent unfair rates to A as compared with rates given to B. It seems to me that the state is bound to insist that the rates shall be public, and that practically will settle it, for if they are public they have got to be fair; I am inclined to think the law should confine itself to securing that, where there is a difference made as between A and B, the difference should be a difference for a commercial reason, and not for any reason of personal favoritism.

"THE CHAIRMAN. You have studied the railroad rates in the United States in comparison with foreign railroad rates, I take it. How do they compare as to charges for similar distances?

"MR. ACWORTH. I think we can beat you up to 20 or 30 miles. Then the best guess we can give is that our rates per ton per mile are three times yours.

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"SENATOR FORAKER. What is your opinion as to the general effect of prescribing these maximum rates?¹ Has it been beneficial to the shipper, or otherwise?

"MR. ACWORTH. I do not think, sir, the maxima have any importance whatever in relation to wholesale traffic. The only person they protect, if they do protect him, is if you or I want to send a few hundredweight

¹ The maximum rates are based on what the railroads had been charging in the past.

of some goods from one local station to another. That is the only case in which they apply.

"SENATOR FORAKER. In local business and on short hauls?

"MR. ACWORTH. Local business, short hauls, small quantities.

"SENATOR FORAKER. Where there is no competition, practically?

"MR. ACWORTH. Partly that, and partly where the traffic is expensive. I have no doubt in many cases the result of the maxima is that this expensive local business is done at a rate which does not represent a reasonable profit.

"SENATOR CULLOM. Your judgment, as I understand you, is that whatever regulation you have had there has been of advantage to the country. I refer to regulation by Parliament in the passage of laws. Am I correct in stating that as your view?

"MR. ACWORTH. I do not think I put it as strong as that, sir. I say that I think it must be recognized that regulation is unavoidable — I would even say desirable; but I think a good deal of our regulation, and certainly the recent regulation preventing a railway from raising a rate when once it is lowered, is very much against public interest. I also think that the legislation in regard to undue preference in the degree to which the courts have carried it is against the public interest. It prevents the whole sale principle being applied where, on commercial grounds, it ought to be applied."¹

Let us now turn to our own experience in this country with railway rate regulation, to see whether it follows the same lines of development as in England, from which our Interstate Commerce Act was so largely borrowed.

The Erie Canal was completed in 1825, and within about six months from that time the Legislature of the State of New York chartered a railway from Albany to Schenectady, one of the first railways chartered in this country. From that time on, the United States followed the lead of England in chartering and developing railways. They were small affairs, of very simple and cheap construction as to tracks and rolling stock. They were not then adapted to the economical movement of freight, because the engines and cars were so small and weak. In many cases the railroad was left free to fix its own tolls and charges; in other cases the common maximum was four cents per ton per mile for freight. In the beginning, the fact was recognized that these railways could not successfully compete with the water ways in the transportation

¹ Hearings before Committee on Interstate Commerce, pp. 1843 to 1870, especially pp. 1851-53, and 1856-58.

of freight. These railroads were not of sufficient length or magnitude to carry interstate freight. They were often of different gauges, for the express purpose of preventing the cars of one from being run over the tracks of another. The freight was carried to the end of a short line, removed from the cars, and placed on the cars of a connecting line, several times between cities no further apart than Buffalo and New York, the result being heavy and unnecessary terminal expenses for handling such freight. Naturally railway consolidations began to introduce economies, and to eliminate such unnecessary terminal expenses. As engines, cars, and roadbeds were improved, and such terminal expenses were eliminated, it was found that the railroads could compete with water carriers, especially canals and rivers, for much of the freight carried by them, and the result was that canals ceased to be built, and in this country, as in England, most of them began to decay. The fight of river steamship lines to prevent railways from bridging rivers like the Mississippi or the Ohio ultimately resulted in favor of the railways, because the railways had become so useful to the people that the people found them indispensable. As railways multiplied, however, competition between them became keen, and the natural result was secret agreements and rebates, often disastrous to localities and individuals. Railroad wars entailed railway losses, for which the railroads often sought to compensate themselves by high local charges. To prevent such unjust discrimination, soon after 1870, states like Wisconsin, Iowa, and Mississippi undertook to regulate the rates charged by railways within their borders, either directly or through railroad commissions, by the so-called "Granger" legislation. The railways appealed to the United States Supreme Court to test the constitutionality of such legislation, but they were uniformly told that the states had the lawful right to regulate charges of railroads within their boundaries, because the Constitution of the United States gave the courts of the United States no right to interfere with such regulation of intra-state rates, so long as it did not pass the inhibitions of the United States Constitution. At the October, 1876, term of the Supreme Court, several decisions were handed down sustaining this right of the states, upon the ground that the railroads' property was devoted to a public use and was, therefore, subject to rate regulation by the state authorities.¹

¹ Grain elevators were held to be subject to legislation fixing their "maximum charge of storage." *Munn v. Ill.*, 94 U. S. 113.

In the Railroad Commission cases,¹ the power of Mississippi to grant away the right to fix a limit upon railroad charges was denied, unless, at least, the words were stronger than those in the charter there involved, which gave the right to "regulate and receive tolls and charges." In so holding, however, the United States Supreme Court, about twenty years ago, first thus clearly stated the principle which has since become so important in the discussion of this whole subject:²

"The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."

The principle laid down by Chief Justice Waite in the significant language just quoted, is all the more important because he also wrote the opinion in the *Munn Case*, and its associate cases, in 94 U. S. It was not immediately applied, however, in litigations, because a different principle laid down shortly before in the case of a ferry, promised the railroads, so often defeated, a different avenue for escape.

In *Gibbons v. Ogden*,³ Chief Justice Marshall had said of the

In *Chicago, etc., R. Co. v. Ia.*, 94 U. S. 155, the right of Iowa to classify railroads and fix "reasonable maximum rates" was upheld.

In *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164, the right of Wisconsin to fix "maximum rates" was upheld, upon the theory that the sole question involved was "the power" of the legislature of Wisconsin so to do.

In *Chicago, etc., R. Co. v. Ackley*, 94 U. S. 179, it was held that the railroad could not recover more than the "maximum" fixed by Wisconsin, upon merely showing that the rate charged was "reasonable compensation"; but it will be noted there was no attempt to show what should have been shown, that the "maximum" was not "reasonable compensation."

In *Winona & St. Peter R. Co. v. Blake*, 94 U. S. 180, it was held there was nothing in the railroad charter in that case "limiting the power of the state to limit the rates of charge."

In *Stone v. Wisconsin*, 94 U. S. 181, it was held that the charter did not prevent Wisconsin from fixing maximum charges, because the charter was under a state statute "subject to the reserve power of alteration or repeal," and the state court of Wisconsin having so decided, its decision was binding upon the United States Supreme Court.

¹ *Stone v. F., L. & T. Co.*, and *Stone v. Ill. C. R. Co.*, 116 U. S. 397, 347.

² *Stone v. F., L. & T. Co.*, *supra*, at 331.

³ 9 Wheat. (U. S.) 195, 196.

constitutional provision giving Congress the power to "regulate" interstate and foreign "commerce":

"The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with" (such) "commerce. . . . It may of consequence pass the jurisdictional line of New York and act upon the very waters" (of the Hudson River).

This principle was applied to taxes of the State of Pennsylvania levied upon ferry boats plying between Gloucester and Philadelphia, in a case decided April 13, 1885.¹ In deciding that case, Field, J., said:

"The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

October 25, 1886, this significant language was applied to prevent the operation of the statute of Illinois, enacted in 1871 to regulate railway rates, from interfering with the charges of the Wabash Railway on a shipment of freight from the interior of Illinois to the city of New York.² In the powerful prevailing opinion of Justice Miller, he cites the last case, among others, and holds that the case was, in fact, controlled by the State Freight Tax Case,³ where four years before it had been held that an act of Pennsylvania was void "as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the state by any railroad company, or into it from any other state, or out of it into any other state, and valid as to all freight the carriage of which was begun and ended within the limits of the state."

These decisions made it quite clear that the state regulations of railway charges were largely ineffective, because so large a part of the freight carried by railroads had come to be interstate commerce. Furthermore, the investigations of the Hepburn Committee,

¹ Gloucester Ferry Co. v. Pa., 114 U. S. 203, 204.

² Wabash Ry. Co. v. Ill., 118 Ill. 570.

³ 15 Wall. (U. S.) 232.

and other committees, had made public the astonishing system of rebates then almost universal.¹ It became known, for instance, that a single customer of the Pennsylvania Railroad Company had received over eleven million dollars of rebates from that company in a single year. These rebates were not confined to rebates upon its own traffic, but covered the traffic of its competitors. How great a change has been wrought in the situation then existing by the Interstate Commerce Act subsequently enacted is apparent from the fact that the very railroad just mentioned, and its federated lines, now have a gross business of substantially \$266,000,000.00 a year, and the very magnitude of that business would make any system of rebates unnecessary and impossible, even if the Interstate Commerce Statute had not been largely instrumental in abolishing such rebates. While some rebates are probably secretly paid by a few railroads, their aggregate amount is very small, and there is abundant testimony to the effect that the Pennsylvania Railroad Company then paid many times more rebates in a single year, to that single customer, than are now paid by all the railroads of the country put together.

The result of the decisions of the courts showing that Congress had the power to regulate interstate commerce, and the facts disclosed by a careful and statesmanlike report of the Senate Committee showing that Congress ought to exercise that power, was that Congress ended the fight begun by the states, by enacting the Interstate Commerce Act of February 4, 1887. That Act was not the result of a radical and uncontrolled impulse to strike at the railroads, but was the result of long-continued discussion and investigation, careful study of the legislation of England, and of adopting and adapting the English legislation, so far as possible.

At the time this report was made almost every railroad had its own system of classifying freight, and the result was great confusion and sometimes great difficulty in getting one railroad to forward the freight of another, because of the difference in classifications and in rates upon the same kind of freight upon different roads. Congress did not intend to give the Commission the power to make rates, or the power to make or change classifications. This distinctly appears from its report, in which it is said:

¹ So universal were these rebates, that Mr. Hadley quotes a witness before the Hepburn Committee as thus testifying:

"Q. Then the condition of getting the special rate is making the application?
A. Yes, sir." Hadley, *Railroad Transportation*, 121.

"the difficulty encountered has been how to provide for or require uniformity, without specially prescribing the classification which shall be adopted, or without giving a commission authority to establish a classification, which would be equivalent to authorizing such commission to fix rates."

At the conclusion of the Committee's report, we find the intent of the Interstate Commerce Act thus tersely stated:

"The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful, and by adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to rates, financial operations, and methods of management of the carriers."

The Act makes "unlawful" charges not "reasonable and just"; forbids all kinds of "unjust discrimination" as to "contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions"; makes unlawful "undue or unreasonable preference or advantage to any particular person, . . . locality, or . . . traffic"; makes unlawful a larger charge for a shorter haul, unless authorized by the Commission after investigation; makes unlawful any "combination . . . for the pooling of freights . . ."; requires rates and charges to be made public, and not to be changed inside of ten days, upon published notice, and gives wholesale remedies, civil and criminal, by which the Commission and the courts can enforce its provisions against the roads, individually or collectively, as may be proper.

Amendment later being deemed necessary, Congress passed the Elkins Act of 1903, making the shipper and carrier alike criminals for either offering, soliciting, paying, or receiving rebates from "established" rates. In so doing the Commission and President were taken at their word that, thus amended, the law would substantially end all difficulties. The Elkins Law was well drawn, and it has done much, but, as shown, the main Act should be further amended to cover unjust charges and discriminations not now covered by it.

Beyond doubt, the public was disappointed to find that the original Act was not a panacea for all the complaints about the railroads to which they had so long listened in the disclosures and the discussions that preceded the Act. The first volume of the reports of the Commission is full of cases in which the Commission was called upon to investigate complaints of boards of

trade of cities like Boston and New Orleans, showing that the railroads were discriminating against them and thus depriving their merchants and citizens of the trade or the accommodations which they should enjoy. Almost without exception, these complaints proceeded on the theory that the cities and towns in question were entitled to enjoy the advantages which they had previously enjoyed, or that they were entitled to advantages they did not enjoy because on a mileage basis they should be treated more favorably than some rival city or town. The investigations of the Commission, and the experience and good sense of such strong men as the chairman of the Commission, the great jurist and author, Cooley, resulted in almost no change by the Commission, as the result of these investigations and complaints by cities and towns. The result was fierce public criticism of the Commission, which caused the chairman of the committee that passed the Act to make a public speech defending it, and bespeaking public patience, that the Commission, and the law under which it was acting, might be fairly tested before being condemned. It was soon found, however, that the provisions of the law for requiring the common carriers subject to the Act to file reports, contracts, schedules of rates, and like information, with the Commission, not only furnished the Commission with an accurate knowledge of what the various carriers were doing, but enabled the rivals of those carriers to ascertain, through the files of the Commission, what was being done. This publicity was expected to be, and has been from the beginning, of the greatest value in this country, as Mr. Acworth shows it was and is in England. Rival carriers, keen for every advantage, and able to scan each other's contracts, reports, and charges, are quick to complain, or to cause customers to complain, if a rival is caught violating the law. If a carrier finds it is losing the traffic of a given place, or a given customer, it knows that the rival carrier has either filed a lower rate or is secretly cutting the rate in violation of the law, and instantly the cut is met, or the carrier, or more frequently the Commission itself, is moved to make an inquiry touching the matter. Thus it comes about that in a very large proportion of the cases no complaint is ever filed, because publicity prevents violations of the Act, or exposes such violations, and thereafter causes the Act to be observed. In a large proportion of the cases where complaints are filed, the carrier complained of makes no contest, but the matter is speedily adjusted to the satisfaction of the complainant and the Commis-

sion. Where a contest is made, the matter involved is usually important, the railroad is advised by its experienced counsel that it is in the right, and the contest is, therefore, made to test the legal question involved. In a large proportion of the cases so contested, the railroads ultimately succeed, and the reports of the Commission, if adverse, are overthrown. This is not because the Commission has not been composed of able and fair-minded men, but because the very composition of it violates the well-known fundamental rule that the functions of an executive, a judge, and a legislator should never be combined in the same body.

The statistics of the cases that have come before the Commission and been tried out before them, and afterwards have been carried into the courts, forcibly sustain what has been said about its conflicting functions.¹ Its members are naturally zealous to sustain by report matters they have previously investigated, or to make a report to bring aid from the courts, if possible, where they have failed as an executive body in enforcing the law as they understand it. In short, the grand juror sits as a petit juror and finds the party he had indicted to be guilty; the district attorney sits as a judge and reaches a like conclusion; the governor, sitting as a judge, condemns the person who has made him trouble as a governor.

A brief examination of the decisions will show that our courts have followed the English courts in construing our statutes, as similar statutes have been construed in England. The act which was passed February 4, 1887, took effect upon the railroads sixty days later. Only about eighteen months from the time it took effect upon the railroads, two warring railroads had tried a case before the Commission, had refused to submit to its decision, and had fought out the case in court to ascertain the true construction of the Act. That case² thus answers the claim the Commission and others have since made, that in the beginning it was understood

¹ Mr. Joseph Nimmo, Jr., in a pamphlet on "Governmental Ownership, the Alternative of Governmental Rate Making," in 1905, stated that since 1887 the freight transactions had approximated three billion; the informal complaints filed with the Commission had been about 8000, the formal complaints 770, the formal complaints brought to a hearing 370, the formal complaints brought before the courts 45, and the number of cases in which the Commission had been sustained was one, and in another case it was partly sustained and partly overruled. The proportions still remain about the same; but the Commission has lately fared better in the Supreme Court.

² Kentucky, etc., Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567, 630, 633.

that it had the right to fix rates: "Neither is the Commission invested with authority to establish through rates, or to fix through rates between connecting lines."

Soon afterwards, Judge Jackson, who pronounced this decision, after a thorough review of the English and American authorities, erected a monument to himself by thus construing the Act in another case:¹

"The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service."

These words have since been quoted again and again in the Supreme Court as furnishing the key to the true construction of the Act.

The decisions of the cases appealed from the Commission to the Supreme Court show how plain, simple, and long established are the legal rules applied to cases by our highest court. The key to the decisions is found in the words of the Statute that require rates "reasonable and just," that prohibit "unjust discrimination" or "undue advantage" under "similar circumstances and conditions." Always, the court stands for commercial liberty and free competition, a natural regulator of prices and rates. Unjust discrimination in favor of carriers that unlawfully become dealers, it strongly condemns and permanently enjoins by injunction under the Elkins Act, as it has just done in the Chesapeake & Ohio Coal Case. The great import, export, and domestic business of our

¹ *I. C. C. v. Baltimore & Ohio R. Co.*, 43 Fed. Rep. 44, 48.

country is to be free as heretofore to develop upon natural lines, determined by geographical and market advantages, and personal ability in producer and carrier. The statute in England and this country alike is often called the "equality" law, and our Court so construes it as to give to producer, consumer, and carrier equality of opportunity, so far as that is practicable where personal abilities and natural and market advantages are unequal and continually changing. Above all things, it will not protect the railroads behind legal technicalities, where it is shown that they are violating the statute.

It will be seen, however, that the courts have never yet decided that the mere power to "regulate" interstate commerce gives power to fix all charges for service rendered in carrying it. This power to "regulate," after much consideration and two arguments, was held by the closest possible division of the Court to permit Congress to prohibit interstate commerce, or use of mails, in buying or selling lottery tickets. But this exercise of absolute sovereign power goes back to the police power, the right of self-preservation, the foundation of all government, the right to prohibit and exclude vice. The Court quoted with approval from a former decision:¹

"Experience has shown that the common forms of gambling are comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries."

But that decision is rested, too, upon the proposition, as stated by Marshall, C. J., in *Gibbons v. Ogden*, that by giving Congress the power to regulate interstate commerce, power was "vested in Congress as absolutely as it would be in a single government, having in its constitution *the same restrictions* on the exercise of the power, as are found in the Constitution of the United States."

But can either state or nation prohibit innocent business? What is "liberty" if men cannot do honest business? Grant that business that is mere vice can be prohibited in the exercise of the police power, can you hold that the power to prohibit all vice, in order to leave honest business a free field, gives the power to prohibit any innocent business? Can Congress make an eight hour labor law applicable to all interstate business, to "regulate" such business, or must our laborers have "liberty" to sell their only property, their "inalienable" right to labor, and to sell that labor? Grant

¹ Lottery Case, 188 U. S. 321, 356.

that the police power permits eight hour laws as to mining, or any dangerous business, where longer hours may undermine the health,¹ or as to municipalities, the creations of the state, and therefore subject to its regulation,² does it follow that the state may do more than prevent such unduly long hours of daily labor as shall endanger the health or lives of its citizens? The answer is plain. Our state legislatures have an almost unlimited power, unless their state constitutions otherwise provide, as generally they do not, to make state laws to tax; to create, classify, and punish crimes; and to regulate, or prohibit, all business, except interstate and foreign commerce. Such unlimited power is not possessed by Congress, because our state legislatures have sovereign powers, while Congress has only certain delegated powers. Yet even our states cannot "regulate" their state business by passing laws making the formation of an innocent business contract, or more than eight hours daily labor in a healthful business like baking, a crime, because the Fourteenth Amendment to the United States Constitution does not thus permit the "liberty" to do honest business to be taken from any man without "due process" of law.³

What, then, is the power of Congress over interstate commerce, and over common carriers, not created by Congress, as mere instrumentalities of that commerce? To regulate their rates of charge for services rendered, can it any more fix the very rate, the price the carrier shall charge, than it can what the laborer or the teamster shall charge for like service? Can it do so any more than it can fix the price of the eggs, cheese, hay, or grain of the farmer, if that becomes interstate commerce? Clearly, it can prohibit extortionate or excessive charges for service to interstate commerce, or for such articles of commerce. It can prohibit and make unlawful extortion or unjust discrimination; for each is an obstacle to, and a burden upon, interstate commerce. In the very language of the Constitution, as Senator Rayner and other Senators properly hold should be done, it may provide that all rates and charges shall return "just compensation" for the service rendered. "Just compensation" should be the statutory standard by which to measure these rates, as it is the standard of the Constitution and of the business world to measure the legality of all other

¹ *Holden v. Hardy*, 169 U. S. 366.

² *Atkins v. Kansas*, 191 U. S. 207.

³ *Allgeyer v. La.*, 165 U. S. 578; *Lochner v. N. Y.*, 198 U. S. 45.

business transactions. But how much "compensation" does that mean the rate may contain? May it contain the cost of service, and some return to the owner, be that owner citizen or corporation, upon the fair value of the property used? In cases under state acts, where legislative power is limited only by the United States Constitution, we find the answer to these questions. We have seen that it was held, "the power to regulate is not the power to destroy."¹ The Court constantly harks back to this clearly stated principle, and holds the rate not only may, but must, give the owner some return upon his property. But this does not mean that water in the stock is value, or that stocks or bonds are necessarily property; so a return upon them need not necessarily be made.²

The courts, however, always have been, and are of right, vested with power to investigate the acts of all persons and commissions to see if they are making extortionate or unjust charges, or if they are interfering with the constitutional or property rights of a person or corporation. Therefore, no commission can be made a substitute for the courts "as an absolute finality," because so to provide would deny to a person "a judicial investigation by due process of law."³

The courts adhere to the principle that a state "legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."⁴ The question of when such rates are "reasonable" is "eminently a question for judicial investigation requiring the process of law for its determination. . . . The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public." So, corporate railroad rates fixed by a state commission were there condemned by the courts as "unreasonable and unjust," although the courts held they could not make rates to take the place of those there enjoined.⁵

But railroads or bridges may be so expensively built and so poorly located that just and reasonable rates will return no profit,

¹ Railroad Commission Cases, 116 U. S. 307, 331.

² Dow v. Beidelman, 125 U. S. 680.

³ Chicago, etc., Ry. Co. v. Minn., 134 U. S. 418, 457.

⁴ Chicago, etc., Ry. Co. v. Wellman, 143 U. S. 339, 344.

⁵ Reagan v. F. & T. Co., 154 U. S. 362, 398-9.

and what can the courts do then? This question is unanswered, but the courts have said: ¹ "It is unnecessary to decide, and we do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit . . . is conclusive that the tariff" (made by the state) "is unjust and unreasonable."

What then, is the test? The Court answers: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction *must be the fair value of the property being used by it* for the convenience of the public." This would exclude water in stock or bonds; it might result in a value above or below cost, or stock and bonds combined. The Court says: ²

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

The presumption is, however, that the rate fixed by the state is reasonable. It is for the party challenging it to overthrow it with clear proof. It is not enough to do this to show that the same rate upon a single commodity applied to "all" freight would result in insufficient revenue to pay expenses, because that particular rate may be profitable, and the thing to be shown is "that, at the rates fixed by the Commission, there would be no "profit, or an insufficient profit upon the coal so transported."³

From this review of the decisions, it will be seen the Court is ever ready to protect the individual from "unjust" rates, or the carrier from rates that do not return "compensation" for the service rendered.

The readiness of the Court to lend its aid to smash the most powerful combinations of railroads and corporations that capital, served by able lawyers, can devise, has been shown in *U. S. v. Trans-Mo. Freight Ass.*,⁴ holding that even a valid contract between

¹ *Covington T. Co. v. Sandford*, 164 U. S. 578, 594.

² *Smyth v. Ames*, 169 U. S. 466.

³ *Minn. & St. L. R. v. Minn.*, 186 U. S. 257, 265.

⁴ 166 U. S. 290.

railroads to regulate freights, is subject to the constitutional power of Congress to regulate interstate commerce, and therefore became illegal when the so-called "Anti-Trust Act" was passed in 1890.¹

Does not this review of legal decisions of the Supreme Court show that that Court stands impartial between producers, consumers, and carriers, destroying combinations inimical to competition, destroying unjust practices and rates of carriers, resulting in unjust discrimination, and preserving competition where rates condemned by the Commission are the result of such competition? Is it not apparent from this review of the decisions that the Court can be depended upon to see to it that the liberty of the most humble laboring man to labor more than eight hours in a healthful calling shall not be interfered with, nor shall the liberty of the most powerful corporation to make honest contracts, or to receive just compensation for service, be illegally interfered with, even by state or national governments? Is it not apparent, however, that those who claim there has been illegal interference with their rights are required to make clear proof of such charges before the courts will interfere in their behalf? What reason, then, is there for the open attack upon this Court in 1896, or the silent and veiled attack upon it by ignoring it in the Hepburn Bill, for which some of the same leaders, among others, are responsible in the Senate now?

Furthermore, is it not clear that, so long as our courts remain, their doors cannot be legally shut upon suitors whose constitutional rights are invaded? The Constitution being the supreme law of the state as well as of the nation, and the Supreme Court of the United States being embedded in that Constitution as a part of it, and independent of all other branches of the Government, is it not evident that the Constitution itself is the real obstacle in the way of those who would ignore the courts in their attempts to "regulate" matters?

May Congress delegate to a commission the power to condemn regulations and practices of common carriers without fixing any

¹ Differently presented by a different combination of railroads, substantially the same question received the same answer. *U. S. v. Joint Traffic Ass'n.*, 171 U. S. 505. A still more powerful combination behind a skillfully devised railroad stock-holding corporation called the Northern Securities Company, was compelled to yield to the same legal principle, in the *Northern Security or Merger Case*, 193 U. S. 197.

This principle has also been applied to combinations of manufacturers of iron pipe, although such business is essentially a private business. *Addyston Pipe Co. v. U. S.*, 175 U. S. 211.

standard by which to test the lawfulness of such regulations and practices? This question is most important, because it involves the classification of more than eight thousand items of freight, and the rules and regulations governing its transportation. Undoubtedly, Congress may provide that any regulation or practice that shall work unjust discrimination, or undue preference, or any extortionate rate, shall be unlawful, and may be condemned by the Commission for that reason. No subject touched by the Hepburn Bill is of greater importance than this, and yet it has received but little attention in most of the discussions. Without going further into the authorities, it should be clear that Congress cannot delegate its power to a commission and permit it to fix its own standard by which to test a rate, a regulation, or a practice. Congress must declare what rates, regulations, and practices shall be unlawful, and must thus fix the standard by which the Commission shall test those questions. To the extent that the rates, regulations, or practices are innocent, they may not be condemned by Congress or the Commission, because "liberty," within the Constitution, means the right to do honest business through honest contracts, in any honest way. If Congress had created the carriers sought to be regulated, its power over them might be greater, because the creator of a corporation may regulate that corporation through the power of amending or repealing the legislation creating it. Here, however, Congress is dealing in almost every instance with state created corporations, which the courts have frequently declared are entitled to the same rights under the United States Constitution as a natural citizen doing like business, unless their charters otherwise provide.

But an important question most earnestly debated is whether Congress has the power to compel the courts to deny a temporary injunction to either citizen or corporation to protect constitutional rights, when it is claimed that they are violated, impaired, or destroyed by the action of the Commission. Is a temporary injunction "due process" to protect constitutional rights, within the Fifth and Fourteenth Amendments? A temporary injunction to protect legal rights, until a court of equity could finally hear and determine the case, was a well-known process of the courts of equity when the Amendments embedded "due process" into our Constitution to protect constitutional rights. Congress created the lower federal courts, and can confer jurisdiction, regulate procedure, and make rules of evidence for them; but can Congress

itself violate constitutional rights, or create a commission and give it power to violate them, and then order the federal courts to deny temporary injunctions to persons seeking such injunctions to protect such rights? May Congress say to parties who complain, "We have ordered a final hearing in the case expedited, that you may have the earliest possible day in court, so a temporary injunction is unnecessary"? Would that be a reasonable regulation of procedure as to injunctions? This question is a most important and a close one, and has never been squarely passed upon by our highest court. Congress cannot make a ruling of the Commission "final,"¹ but can make its findings of fact *prima facie* evidence in the courts. This being so, may Congress also say, as a regulation of procedure in the courts, as a rule of evidence, that the findings of the Commission shall stand as evidence until some court finds otherwise after a trial upon the merits? Is a corporation denied a day in court if it is given the earliest possible day in court, ahead of all others, for a trial on the merits? Is that corporation denied a day in court, then, because it has not also had a preliminary day in court to get a temporary injunction? Because the temporary injunction cannot be got, it does not follow that the order of the Commission must be obeyed. On the contrary, it may be ignored until enforced by a court. The Commission has no more power to make a "final" decision impairing or destroying constitutional rights than a committee of Congress would have; nor can Congress delegate its power to such a commission unknown to the Constitution.²

Assuming that all the federal courts except the Supreme Court can be abolished by Congress because they were created by Congress, can Congress deny access to them while they remain in existence? And if Congress could deny access to them, or should abolish them, would the difficulty of the rate-makers who wish to evade constitutional rights be thereby removed?

It is true, perhaps, that suitors could not bring suits in the Supreme Court of the United States, but what is to prevent their going into the state courts and insisting that they have constitutional rights under the supreme law of the land which the state courts can and shall vindicate? Suppose the state courts should refuse to entertain the suits, or to vindicate such rights, and the

¹ *Brimson v. I. C. C.*, 154 U. S. 447.

² *Kilbourne v. Thompson*, 103 U. S. 168.

suitor should carry his case from court to court until finally, by writ of error, he should bring it from the highest state court to the United States Supreme Court, what would be the result? Has not the Supreme Court of the United States reversed the highest state courts in a multitude of cases because they have refused to hear or to consider, or to yield to rights claimed under the United States Constitution? Upon what principle, then, would it be that the state courts could refuse suitors their rights under the United States Constitution because railroad rates are involved, and those rights are claimed in state courts, as other rights have been? If the state courts should deny suitors their constitutional rights under the United States Constitution, where such rights are claimed in them, what fair argument is there for urging that the United States Supreme Court would also be powerless to vindicate their rights under the Constitution which created the Supreme Court for the very purpose, among others, of vindicating violations of the Constitution?

Is it not apparent that in the last analysis we cannot escape the courts if we would, and we should not avoid them if we could? No cases of sufficient importance to be reviewed by them should fear their review. No just legislation should be afraid of their construction or enforcement. Courts are the very bulwarks of our liberties and our government, and if we cannot trust them, our institutions are a failure, and we may soon expect a strong man in the saddle to furnish us with something stronger, if not better.

Adelbert Moot.

BUFFALO, N. Y., April, 1906.

FOLLOWING MISAPPROPRIATED PROPERTY INTO ITS PRODUCT.

IF a trustee wrongfully sells the trust-*res* or exchanges it for other property, the *cestui que trust* may charge him as a constructive trustee of the money or newly acquired property, or of any subsequent product of either;¹ or, if he prefers, he may enforce an equitable lien to the amount of the misappropriation upon any property in the hands of the wrongdoer, which is the traceable product of the original trust-*res*.² If, at the time of relief given, the new property is worth less than the original trust-*res*, the *cestui que trust*, after exhausting his lien, will have a personal claim against the trustee for the difference. If the new property is worth as much as or more than the original trust-*res*, the enforcement of the constructive trust or of the equitable lien will be a full satisfaction of all claims founded on the breach of the express trust. When the value of the new property exceeds that of the original trust, the *cestui que trust*, by enforcing the constructive trust, makes a profit by the trustee's breach of the express trust, and this profit may be very large, as when the trust fund is invested in land or corporate shares which advance rapidly, or, to put the most conspicuous instance of great profit, when the trustee invests trust money in taking out a policy of life insurance which becomes payable soon afterwards by the death of the insured. The *cestui que trust* takes the whole of the insurance money, although ten times as much as the trust money misappropriated.³

¹ If the wrongdoer after exchanging the original trust-*res* for other property buys it back again, the *cestui que trust* has the option of charging him as trustee of the old *res* or the newly acquired property. It was thought at one time that the Statute of Frauds barred the claim of the *cestui que trust* to land acquired by the misuse of the trust fund. *Newton v. Preston*, Pr. Ch. 103; *Kirk v. Webb*, Pr. Ch. 163; *Herron v. Herron*, Pr. Ch. 163; *Free*, Ch. 246 s. c.; *Kinder v. Miller*, Pr. Ch. 171, 2 Vern. 240 s. c.; *Halcot v. Marchant*, Pr. Ch. 168; *Hooper v. Gyles*, 2 Vern. 480; *Cox v. Bateman*, 2 Ves. 19. But these cases were long ago overruled, — *Lane v. Dighton*, Amb. 409; *Ames*, Cas. on Trusts, 1st ed., 323, 325, n. 1.

² "The beneficial owner . . . is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money." Per Jessel, M. R., *Re Hallett*, 13 Ch. D. 696, 709.

³ *Lehman v. Gunn*, 124 Ala. 213; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Holmes v. Gilman*, 138 N. Y. 369; *Dayton v. Claflin Co.*, 19 N. Y. App. Div. 120; *Roberts v. Winton*, 100 Tenn. 484 (*semble*); *Bromley v. Cleveland Co.*, 103 Wis. 562, 567 (*semble*).

This excess above full compensation is not given to the *cestui que trust* by reason of any merit on his part. It comes to him as a mere windfall. Public policy demands that the faithless trustee should not retain any advantage derived from his breach of trust. Hence the wholesome rule that whatever a trustee loses in the misuse of the trust fund he loses for himself, and whatever he wins, he wins for the beneficiary.¹

If this rule is to be applied consistently, it follows that if a trustee buys property partly with his own money and partly with trust money, the *cestui que trust* is entitled to that proportion of the property bought which the trust money used bears to the entire purchase money. The authorities are numerous to this effect,² although in several of them this result was assumed as a matter of course without argument. But in two states, Massachusetts and Ohio, the *cestui que trust* is allowed only a lien upon the new property to secure the amount of the misused trust fund.³

In several other cases the remedy given was that of a lien.⁴ But in these cases the question of an alternative right to a proportionate part of the new property was not raised by the counsel nor considered by the court. In truth, the *cestui que trust* should be given the option of a proportional part of the new property or

¹ A pledgee of shares who wrongfully sells them for \$5000 and afterwards buys them back for \$3000 and gives them to the pledgor upon payment of the debt must also surrender his profit of \$2000. *Langton v. Waite*, 6 Eq. 165, 173.

² *Docker v. Somes*, 2 Myl. & K. 655; *Re Oatway*, [1903] 2 Ch. 356; *Nat. Bank v. Ins. Co.*, 104 U. S. 54, 68; *Re Mulligan*, 116 Fed. Rep. 715, 717; *Barrett v. Kyle*, 17 Ala. 306; *Tilford v. Torrey*, 53 Ala. 120, 122; *Walker v. Elledge*, 65 Ala. 51 (*semble*); *Kelley v. Browning*, 113 Ala. 420; *Howison v. Baird*, 40 So. Rep. 94 (Ala. 1906); *Byrne v. McGrath*, 130 Cal. 316; *Elizalde v. Elizalde*, 137 Cal. 634 (*semble*); *Bazemore v. Davis*, 55 Ga. 505; *Harris v. McIntyre*, 118 Ill. 275; *Reynolds v. Sumner*, 126 Ill. 58; *Fansler v. Jones*, 7 Ind. 277; *Bitzer v. Bobo*, 39 Minn. 18; *Morrison v. Kinston*, 55 Miss. 71; *White v. Drew*, 42 Mo. 51; *Bowen v. McKean*, 82 Mo. 594; *Shaw v. Shaw*, 86 Mo. 594; *Jones v. Elkins*, 143 Mo. 647; *Crawford v. Jones*, 163 Mo. 578; *McLeod v. Venable*, 163 Mo. 536; *Johnston v. Johnston*, 173 Mo. 91, 115; *Bohle v. Hasselbroch*, 64 N. J. Eq. 334; *Dayton v. Claffin Co.*, 19 N. Y. App. Div. 120; *Lyon v. Akin*, 78 N. C. 258; *Wallace v. Duffield*, 2 S. & R. (Pa.) 521; *Kepler v. Davis*, 80 Pa. 153; *Rupp's App.* 100 Pa. 531; *Lloyd v. Woods*, 176 Pa. 63; *Sheetz v. Neagley*, 13 Phila. 506; *Green v. Haskell*, 5 R. I. 447; *Watson v. Thompson*, 12 R. I. 467; *Kaphan v. Torrey*, 58 S. W. Rep. 909 (Tenn. 1899); *Moffatt v. Shepard*, 2 Pinn. (Wis.) 66.

³ *Bresnihan v. Sheehan*, 125 Mass. 11; *Reynolds v. Morris*, 17 Oh. St. 510.

⁴ *Lane v. Dighton*, Amb. 409; *Price v. Blakemore*, 6 Beav. 507; *Hopper v. Conyers*, L. R. 2 Eq. 549; *Re Pumfrey*, 22 Ch. D. 255, 260; *Graves v. Pinchback*, 47 Ark. 470; *Humphreys v. Butler*, 51 Ark. 351; *Nat. Bank v. Barry*, 125 Mass. 20; *Munro v. Collins*, 95 Mo. 33; *Day v. Roth*, 18 N. Y. 448; *Bryant v. Allen*, 54 N. Y. App. Div. 500 (affirmed 166 N. Y. 637).

a lien upon it, as may be most for his advantage.¹ If the new property appreciates, it will be for his interest to claim a proportionate share of it. If it depreciates, he will naturally prefer to claim a lien upon it to the extent of the misused trust money. In two states, New Jersey and Pennsylvania, a trustee, who makes a purchase partly with his own money and partly with a trust fund, is treated with extreme severity. In New Jersey he loses not only the share of profit attributable to the trust money, but also that due to his own money, the *cestui que trust* being entitled to the whole of the new property, subject to a lien in favor of the trustee to the amount of his own contribution.² In Pennsylvania, if the product of the joint funds is in the form of shares in different companies, some of which have appreciated, while others have depreciated, the *cestui que trust* may take his proportion of the purchase from the shares which have proved the most profitable.³

The principles thus far considered apply to all fiduciaries, not only to trustees, who have the legal title to the misappropriated property, but to bailees, guardians, and the like, who have possession but not title.⁴ Although in a few early American cases the courts declined to permit the owner of property to recover its product, as a constructive trust, if the misappropriation was by any person other than a fiduciary,⁵ it is now well settled that one who has been deprived of his property by fraud, by theft, or by any wrongful conversion, may charge the fraudulent vendee, the thief, or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property.⁶

¹ This option was allowed in *Bitzer v. Bobo*, 39 Minn. 18; *Crawford v. Jones*, 163 Mo. 578; *Green v. Haskell*, 5 R. I. 447.

² *Bohle v. Hasselbroch*, 54 N. J. Eq. 334

³ *Norris's App.*, 71 Pa. 106.

⁴ *Re Hallett*, 13 Ch. D. 696, 709, 710.

⁵ *Pascoag Bank v. Hunt*, 3 Edw. 583; *Campbell v. Drake*, 4 Eden 94; *Rain v. McNary*, 4 Humph. (Tenn.) 356; *Cunningham v. Wood*, 4 Humph. (Tenn.) 417; *Hawthorne v. Brown*, 3 Sneed (Tenn.) 462.

⁶ *Fraud*. *Smith v. Atwood*, You. 607; *Taub v. McClelland Co.*, 10 Col. App. 190; *Farwell v. Homan*, 45 Neb. 424 (*semble*); *Bank of America v. Pollock*, 4 Edw. 215; *American Co. v. Fancher*, 145 N. Y. 552; *Converse v. Sickles*, 146 N. Y. 200 (*semble*); *Reynolds v. Ætna Co.*, 28 N. Y. App. Div. 591; *Menz v. Beebe*, 102 Wis. 342.

Theft. *Cattley v. Loundes*, 34 W. R. 139; *Re Hulton*, 39 W. R. 303, 8 Morrell 69 s. c.; *Pirtle v. Price*, 31 La. An. 357; *Nat Bank v. Barry*, 125 Mass. 20; *Nebraska Bank v. Johnson*, 51 Neb. 346; *Lamb v. Rooney*, 100 N. W. Rep. 40 (Neb. 1904);

At one time an action for money had and received was not allowed against a converter for the proceeds of the sale of the converted chattel.¹ But this doctrine was overruled two centuries ago.² There seems to be no good reason why one who has disseised another of his land and sold it, should not be similarly liable to the disseisee for the proceeds of the sale in an action for money had and received. But the right to such an action was denied in Massachusetts in 1843.³ Nor has the writer discovered any decision to the contrary. This Massachusetts decision, it is submitted, should not be followed. But be that as it may, it is believed that the courts of equity will not hesitate to give a disseisee the benefit of any property acquired by the disseisor in exchange for the land of the disseisee. Accordingly, the rule as to following misappropriated property into its product in the hands of the wrongdoer may be formulated as follows: If property of any kind is misappropriated in any manner by one who knows it to belong, either at law or in equity, to another, the true owner may charge the wrongdoer as a constructive trustee of any property in his hands which is the traceable product of the misappropriated *res*, or, if he prefers, he may enforce an equitable lien upon this traceable product to the extent of the value of the misappropriated *res*.⁴

If the misappropriated *res*, or its product, has been transferred by the wrongdoer, the rights of the defrauded owner to assert a trust or lien against the transferee will vary accordingly as the latter is a *mala fide* transferee, a *bona fide* donee, or a *bona fide* purchaser.

The *mala fide* transferee, obviously, is in the same case as the original wrongdoer.⁵ If he gets the legal title from the wrongdoer he will hold it as the wrongdoer held it. If he gets merely the pos-

Newton v. Porter, 69 N. Y. 133 (affirming 5 Lans. 416); Reynolds v. Ætna Co., 28 N. Y. App. Div. 591, 601.

Other wrongful conversion. La Comité v. Standard Bank, 1 C. & E. 87; Re Woods, 121 Fed. Rep. 599; Graves v. Pinchback, 47 Ark. 470 (*semble*); Humphreys v. Butler, 51 Ark. 351.

¹ Phillips v. Thompson, 3 Lev. 191 (1675).

² Lamine v. Dorell, 2 Ld. Raym. 1216; Hitchin v. Campbell, 2 W. Bl. 827.

³ Brigham v. Winchester, 6 Met. (Mass.) 460.

⁴ It was decided in Lister v. Stubbs, 45 Ch. D. 1, that a fiduciary, who accepted a bribe from a third person, and invested the money in securities which appreciated, although liable to his beneficiary for the amount of the bribe could not be compelled to surrender the securities. It is not easy to see the reason for this discrimination in favor of the bribe taker.

⁵ Wheeler v. Kirtland, 23 N. J. Eq. 13.

session from a thief or other converter, he is himself a converter and becomes a trustee of any property which he may receive in exchange for the converted *res*.

The *bona fide* donee may or may not acquire the legal title to the *res* conveyed to him by the wrongdoer. If he gets the title, its acquisition, it is true, is honest; but its retention, after knowledge of his grantor's wrong in conveying it, would be dishonest, for he, a volunteer, would thereby enrich himself at the expense of the defrauded *cestui que trust*. From the moment of his discovery of his grantor's fraud, therefore, the *bona fide* donee is in the same position as to the *res* in his hands as if he had at that moment acquired the property *mala fide*.¹

If, however, the *bona fide* donee should dispose of the property before discovering his grantor's fraud, he is not accountable for its value to the *cestui que trust*. Not at common law, for he has committed no legal tort in dealing with property which by the common law was his own. Not in equity, for he has committed no equitable wrong in parting with a legal title which he believed to be free from any equitable incumbrance. If his transfer was gratuitous, he is not liable in any way to the defrauded *cestui que trust*.² If, however, his transfer was for value received, the situation is changed. If he keeps the value received he, a volunteer, is making a positive gain at the expense of the *cestui que trust*. He must, therefore, either surrender the value received or account to the *cestui que trust* for the value of the misappropriated trust-*res*. But he should have the option of doing the one or the other. If the value received was less than the value of the *res* transferred by him, or if the newly acquired property has depreciated below the value of that *res*, the donee does all that can, in justice, be required of him by giving up what he received in exchange for his transfer.³ He has acted honestly and makes no profit. If, on the other hand, the newly acquired property appreciates, and the donee prefers to give the *cestui* the value of the misappropriated *res*, the latter having received full compensation for what was taken from him cannot

¹ *Standish v. Babcock*, 52 N. J. Eq. 628; *Laws v. Williams*, 56 N. J. Eq. 553.

² *Blake v. Metzgar*, 150 Pa. St. 291; *Bonesteel v. Bonesteel*, 30 Wis. 516. He may also buy the property from a subsequent *bona fide* purchaser and keep it. *Mast v. Henry*, 65 Iowa 193.

A striking illustration of this principle is the emancipation by an innocent donee of a slave conveyed to him by a fraudulent donee.

³ *Robes v. Bent*, Moo. 552; *Wheeler v. Kirtland*, 23 N. J. Eq. 13 (*semble*); *Truesdell v. Bourke*, 29 N. Y. App. Div. 95 (affirmed 161 N. Y. 634).

rightfully demand more. The donee, it is true, may, in this case, profit by the misconduct of the wrongdoer. But the retention of this profit by the *bona fide* donee is not forbidden by the principle of public policy which is properly invoked against the *mala fide* grantee of the wrongdoer. Even if the innocent donee cannot make reparation in value, because of his insolvency, he ought not to be obliged to give up to the defrauded *cestui que trust* the whole of the newly acquired property if that is worth more than the misappropriated trust-*res*. Full justice will be done if the *cestui que trust* is given a lien upon the newly acquired property to the extent of the value of the original trust-*res*. The surplus should go to the general creditors of the insolvent donee.

If the *bona fide* donee does not acquire the title to the misappropriated *res*, as when he receives it from a thief or other converter, he is himself, although morally innocent, guilty of a conversion, and must either surrender the converted chattel to the true owner or make reparation in value. Furthermore, if after discovering the title of the true owner, he should transfer the converted *res* in exchange for other property, he would be chargeable as a constructive trustee of the newly acquired property for the benefit of the true owner. Is he also chargeable as a constructive trustee, if his transfer was before his discovery of the tort of his transferor? There seems to be no decision upon this point. It is conceived, however, that equity should not create a constructive trust in this case, if the morally innocent donee is able and willing to make reparation in value for his technical tort. Even his insolvency should not give the defrauded owner more than a lien upon the newly acquired property, if its value exceeds that of the converted *res*, for compensation should be the limit of recovery for a tort, if the defendant acted in good faith.

If a *bona fide* donee of a thief or other converter may keep the product of the converted *res*, in case he is ready to pay the value of the latter to the true owner, a *bona fide* purchaser from the wrongdoer must have the same privilege. And there is authority to this effect. In the well-considered case, *Dixon v. Caldwell*,¹ a military bounty warrant for 160 acres was stolen from the plaintiff, and, after the thief had forged the plaintiff's indorsement, sold to the defendant, a purchaser for value without notice of the theft or forgery.

¹ 15 Oh. St. 412, approved in *Mack v. Brammer*, 28 Oh. St. 508. See to the same effect, *Fletcher v. McArthur*, 117 Fed. Rep. 393.

The defendant then surrendered the warrant to the government and obtained a patent vesting in him the title to 160 acres of land. The plaintiff sought to charge the defendant as a constructive trustee of this land, but his bill was dismissed, the court being of the opinion that the plaintiff's remedy by an action at law for the conversion of the certificate was adequate and that it would be inequitable to deprive the *bona fide* purchaser of his legal title to the land. If the *bona fide* purchaser is unable, because of insolvency, to make reparation in value for his conversion, he, like the *bona fide* donee under similar circumstances, should hold the newly acquired property subject to a lien in favor of the owner of the converted *res* to the extent of the value of the latter.

It follows from the Ohio decision, that, if the defendant, instead of exchanging the warrant for the patent to the land, had sold it, he would not have been liable to the plaintiff in an action of assumpsit for money had and received. There are, however, several decisions to the contrary.¹ But, it should be observed, nothing turned in these cases upon the form of action, since the amount recoverable was practically the same whether the action was assumpsit for money had and received, or trover for the value of the converted warrant. A case may be put, however, in which the defendant would be unfairly prejudiced, if the action of assumpsit for the proceeds of the sale were allowed. Suppose the defendant to have bought the warrant July 1, 1899, and to have sold it June 1, 1905. If actions of tort and contract are barred in six years, the plaintiff's action for conversion would be barred after July 1, 1905, but if he may also charge the defendant for the proceeds of the sale on June 1, 1905, that action would not be barred until June 1, 1911.² It is submitted that the *bona fide* purchaser should not be subjected to the hardship of this prolonged liability.

It is hardly necessary to add that, if the *bona fide* purchaser acquired from the wrongdoer the title to the misappropriated property, he will hold it free and clear from all equitable claims

¹ Bobbett v. Pinkett, 1 Ex. D. 368, 372; Kleinwort v. Comptoir, [1894] 2 Q. B. 157; Indiana Bank v. Holtsclaw, 98 Ind. 85; Buckley v. Second Bank, 35 N. J. Eq. 400; Johnson v. First Bank, 6 Hun (N. Y.) 124. But see *contra*, Baltimore Co. v. Burke, 102 Va. 643.

² Ivey v. Owens, 28 Ala. 641; Lamb v. Clark, 5 Pick. (Mass.) 193; Robertson v. Dunn, 87 N. C. 191.

of the defrauded *cestui que trust*, who must look to his faithless trustee alone for relief.

It has been assumed thus far that it was possible to find in the hands of the wrongdoer, the *mala fide* grantee, the *bona fide* donee or *bona fide* purchaser, some specific property which was unmistakably the product of the original misappropriated *res*. But, in truth, the bulk of the litigation upon this subject has grown out of the difficulty of finding the traceable product of the misappropriated property. If the misappropriation is a sale and the proceeds are invested in the purchase of a tract of land, or a jewel, or in a bond, or note, or are deposited in a bank to the credit of the depositor, the case is simple. The wrongdoer is clearly a constructive trustee of the land, jewel, bond, note or claim against the bank. Suppose, however, that the proceeds of the sale are 100 gold eagles, and that these coins, which are obviously held in trust for the victim of the misappropriation, are put into a bag by the wrongdoer with 100 gold eagles of his own. It is impossible to identify the trust coins. Has the trust, therefore, disappeared? No. Since one gold eagle is just like another, the defrauded *cestui que trust* may say one half of the 200 gold eagles in the bag is held in trust for him, while the other half belongs to the wrongdoer. Suppose, now, that the wrongdoer spends 50 of the gold eagles for his own benefit. Is the *cestui's* claim reduced to 75 or is he still entitled to 100 of the 150 gold eagles remaining? It is well settled that he has the right to 100. This result is commonly explained by saying that the wrongdoer must be presumed to have intended to use his own share of the mixed fund, rather than the share of the *cestui que trust*.¹ This is, of course, a pure fiction. A thief is not likely to manifest such consideration for the victim of his theft. Furthermore, even if it could be proved that the thief actually intended to spend the *cestui que trust's* share first, the result would be the same. The *cestui que trust* would still be entitled to his 100 gold eagles. The true explanation, it is submitted, is this. The *cestui que trust* has an option, the moment the coins are mixed in the bag, to claim either a moiety of the coins, or a charge upon the whole to the amount of the coins originally held in trust for him, that is, 100. On this theory so long as 100 gold eagles remain in the bag, the *cestui que trust* is safe. But if the wrongdoer should spend

¹ *Re Hallett*, 13 Ch. D. 696, 712, 720.

150 of the coins, the charge would be only upon the 50 remaining even though the wrongdoer should afterwards put 50 coins in the bag.

The same reasoning applies to the case in which the wrongdoer deposits trust funds together with money of his own in a bank. If, for example, he deposits \$1000 of trust funds and \$1000 of his own, the *cestui que trust* may at his election hold the wrongdoer as a trustee of a moiety of the \$2000 claim against the bank, or he may enforce a charge upon the claim to the amount of \$1000, and this charge or lien will fully protect the *cestui que trust* so long as the amount to the credit of the wrongdoer does not drop below \$1000, no matter how many checks are drawn upon the bank and regardless of fresh deposits. But if the deposit account falls, at any time, below \$1000, or is all drawn out, the security of the *cestui que trust* diminishes *pro tanto* in the one case and vanishes in the other case.¹ Nor will the security be increased or reappear, by reason of subsequent deposits of his own money by the wrongdoer.²

Let us suppose again that the wrongdoer after depositing \$1000 of the trust money with \$1000 of his own, draws out \$1000 with which he buys shares in a company or other property which remains in his hands. The *cestui que trust* may charge the wrongdoer as a trustee of a moiety of the remaining claim against the bank for \$1000 and also of a moiety of the shares or other property bought with the \$1000 drawn out.³ It seems clear that he should also have a right to enforce a lien for the \$1000 upon both the remaining deposit and the shares or other newly bought property, if he finds it for his interest to do so.⁴ In New Jersey, however,

¹ These statements are supported by the decisions. *Re Hallett*, 13 Ch. D. 696 (overruling *Pennell v. Deffell*, 4 De G. M. & G. 372, and *Brown v. Adams*, 4 Ch. 764); *Gibert v. Gonard*, 540 L. J. Ch. 439; *Spokane Co. v. First Bank*, 68 Fed. Rep. 979, 981 (*semble*); *Re Swift*, 108 Fed. Rep. 212, 113 Fed. Rep. 203; *Re Mulligan*, 116 Fed. Rep. 715, 717, 721; *Re Graff*, 117 Fed. Rep. 343; *Elizalde v. Elizalde*, 137 Cal. 634; *Windstanley v. Second Bank*, 13 Ind. App. 544, 547; *Morse v. Satterlee*, 81 Ia. 491; *Englar v. Offutt*, 70 Md. 78, 86; *Drovers Bank v. Roller*, 85 Md. 495, 499 (*semble*); *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 336; *Importers Bank v. Peters*, 123 N. Y. 272; *Blair v. Hill*, 50 N. Y. App. Div. 33; *Greene's Est.*, 20 N. Y. Supp. 94; *Northern Co. v. Clark*, 3 N. Dak. 26, 30; *State v. Foster*, 5 Wyo. 199, 215.

² *Re Hallett*, 13 Ch. D. 696, 731 (*semble*); *Mercantile Co. v. St. Louis Co.*, 99 Fed. Rep. 485; *Re Mulligan*, 116 Fed. Rep. 715, 719 (*semble*); *Cole v. Cole*, 54 N. Y. App. Div. 37; *Re Youngs*, 5 Dem. Sur. 141.

³ *Re Oatway*, [1903] 2 Ch. 856; *Lincoln v. Morrison*, 64 Neb. 822. But see *contra*, *Bevan v. Citizens Bank*, 19 Ky. Law Rep. 1260; *Bright v. King*, 20 Ky. Law Rep. 186.

⁴ *Lamb v. Rooney*, 100 N. W. Rep. 410 (Neb. 1904).

the court, invoking the fiction that the wrongdoer, in drawing on the mixed deposit account, must be presumed to draw out his own money first, would give to the *cestui que trust* in the case supposed no claim upon the shares or other newly bought property.¹

There is another class of cases illustrating the confusion of funds. A bank receives money on general deposit, knowing that it has no right to receive it, either because of its known insolvency or because the depositor is an official who is prohibited by law from so depositing the money he holds as an official. The bank fails soon afterwards, having in the meantime received and paid out divers sums of money. The money wrongfully received was mixed, of course, with the other money of the bank. Must the depositor, or the body which he represents, come in with the general creditors, or is he entitled to a preference? The answer depends upon the amount of money continuously in the bank from the time of the bank's wrongful receipt of the deposit. The moment the \$1000 was mixed with the other money of the bank, the depositor became *cestui que trust* of that proportion of all the money then in the bank, which \$1000 bore to the total money, or he might claim a lien to the amount of \$1000 upon all the money in the bank. If the total amount of money in the bank was continuously from the moment of the deposit, up to the time the bank closed its doors, equal to or more than \$1000, the depositor would be paid in full. If at any time the total amount dropped below \$1000, the depositor's security would be reduced *pro tanto*, and would not be increased by any subsequent receipt of money of its own.² The

¹ *Standish v. Babcock*, 52 N. J. Eq. 628.

² *Wasson v. Hawkins*, 59 Fed. Rep. 233; *Massey v. Fisher*, 62 Fed. Rep. 958; *Boone Bank v. Latimer*, 67 Fed. Rep. 27; *Cleveland Bank v. Hawkins*, 79 Fed. Rep. 29; *Indep. Dist. v. Beard*, 83 Fed. Rep. 5 (reversed in 88 Fed. Rep. 375, but because of a different view of the facts); *Merch. Bank v. School Dist.*, 94 Fed. Rep. 705; *Quinn v. Earle*, 95 Fed. Rep. 728, 731; *Richardson v. N. O. Co.*, 102 Fed. Rep. 780, 785; *Richardson v. Oliver*, 105 Fed. Rep. 277; *Re Swift*, 108 Fed. Rep. 212, 215; *Woodhouse v. Crandall*, 197 Ill. 104 (reversing 99 Ill. App. 552); *Windstanley v. Second Bank*, 13 Ind. App. 544, 554; *Sherwood v. Central Bank*, 103 Mich. 109; *Wallace v. Stover*, 107 Mich. 190; *Board v. Wilkinson*, 119 Mich. 655; *Bishop v. Mahoney*, 70 Minn. 238, 240; *Shields v. Thomas*, 71 Miss. 260, 270; *State v. Bank of Commerce*, 54 Neb. 725; *State v. Bank of Commerce*, 61 Neb. 181; *Lincoln v. Morrison*, 64 Neb. 822; *Arnot v. Bingham*, 55 Hun (N. Y.) 553; *People v. Merch. Bank*, 92 Hun (N. Y.) 159; *Re Holmes*, 37 N. Y. App. Div. 15 (affirmed 159 N. Y. 532); *Kimmel v. Dickson*, 5 S. Dak. 221; *Piano Co. v. Auld*, 14 S. Dak. 512; *Bank v. Weems*, 69 Tex. 489; *Burnham v. Booth*, 89 Wis. 362, 368; *Slater v. Foster*, 5 Wyo. 199.

Phila. Bank v. Dowd, 38 Fed. Rep. 172, contains a *dictum* against the right of the *cestui que trust*, but this opinion was expressly rejected in *Massey v. Fisher*,

mixing of the depositor's money and the bank's money in the vaults of the bank is not to be distinguished from the mixing by the wrongdoer who puts his own gold eagles with those of another in a bag, or, as in *Kirby v. Wilson*,¹ in his pockets.

Let us now suppose that the misappropriated *res* cannot be traced into any specific land, chattels, bank deposit, or into the money in a bank, but that the court is convinced that the fund for distribution among the creditors of the wrongdoer is larger than it would have been but for the misappropriation. Should the victim of the misappropriation come in ahead of the general creditors? Obviously he cannot establish any trust or lien for want of any specific *res*. But in justice he should be treated as a preferred creditor as to the excess of the actual fund for distribution above what it would have been if the misappropriation had not been made. The general creditors should not make a profit by their debtor's misuse of another's property and at the expense of the defrauded owner. There seems to be no decision on this point. But this is not surprising, for in practice it will be extremely difficult to prove the excess in the fund for distribution without tracing the misappropriated *res* into some specific product.

In a few jurisdictions the true owner is given a preference over the general creditors of the wrongdoer upon the mere proof that the latter had the benefit of the misappropriated *res*, even though it is impossible to prove that the fund for distribution among the general creditors is, at the time of the preference allowed, larger than it would have been but for the misappropriation.² But the

62 Fed. Rep. 958, and is not likely to be followed. In *People v. City Bank*, 96 N. Y. 32, on the other hand, the court seems to have given the *cestui que trust* more than his just claim.

¹ 98 Ill. 240.

² *First Bank v. Hummel*, 14 Col. 259; *Hopkins v. Burr*, 24 Col. 502; *Banks v. Rice*, 8 Col. App. 217 (but see *McClure v. La Plata Co.*, 19 Col. 122; *Holden v. Piper*, 5 Col. App. 71); *Davenport v. Plow Co.*, 80 Ia. 722 (but see *Indep. Dist. v. King*, 80 Ia. 497; *Jones v. Chesebrough*, 105 Ia. 303; *Ewell v. Clay*, 107 Ia. 56; *Moore v. Chesebrough* (1900, Ia.), 81 N. W. Rep. 469; *Bradley v. Chesebrough*, 111 Ia. 126; *Sioux Co. v. Fribourg*, 121 Ia. 230); *Peak v. Ellicott*, 30 Kan. 637; *Reeves v. Pierce*, 64 Kan. 502 (but see *Burrows v. Johntz*, 57 Kan. 778; *Travellers Co. v. Caldwell*, 59 Kan. 156; *Kansas Bank v. First Bank*, 62 Kan. 786); *Carley v. Graves*, 85 Mich. 483 (but see *Board v. Wilkinson*, 119 Mich. 655); *Harrison v. Smith*, 83 Mo. 210 (overruling *Miles v. Post*, 76 Mo. 426); *Stoller v. Coates*, 88 Mo. 514; *Evangel. Synod v. Schoeneich*, 143 Mo. 652; *Pundman v. Schoeneich*, 144 Mo. 194 (but see *Bircher v. Walther*, 163 Mo. 461); *Griffin v. Chase*, 36 Neb. 328; *Capital Bank v. Coldwater Bank*, 49 Neb. 786; *State v. Midland Bank*, 52 Neb. 1 (but see *State v. Bank of Commerce*, 54 Neb. 725).

allowance of a preference under such conditions is unjust to the general creditors. If the product of the true owner's *res* is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. If the true owner's *res* was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim,¹ in which case, also, the dividends of the other creditors would not be affected by the misappropriation. The same result is reached if, without subrogation, the true owner is allowed to prove ratably with the other creditors. But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors. If the true owner's *res* has been squandered, the dividend of the other creditors must be less because of the right of the true owner to prove his claim. But here, too, it would be gross injustice to pay the true owner in full, and thereby diminish still further the dividend of the general creditors. The authorities are nearly unanimous against this unjust preference.²

James Barr Ames.

¹ *Cotton v. Dacey*, 61 Fed. Rep. 481; *Jefferson v. Edrington*, 53 Ark. 345; *Standish v. Babcock*, 52 N. J. Eq. 628, in which cases the subrogation was to the right of a creditor secured by a mortgage.

² *Multnomah Co. v. Oreg. Bank*, 61 Fed. Rep. 912 (disapproving *San Diego Co. v. Cal. Bank*, 52 Fed. Rep. 59); *Spokane Co. v. First Bank*, 68 Fed. Rep. 979; *City Bank v. Blackmore*, 75 Fed. Rep. 771; *Metrop. Bank v. Campbell Co.*, 77 Fed. Rep. 705; *St. Louis Asso. v. Austin*, 100 Ala. 313; *Bank v. U. S. Co.*, 104 Ala. 297; *Winston v. Miller*, 139 Ala. 259; *Ober Co. v. Cochran*, 118 Ga. 396; *Lantermann v. Travers*, 174 Ill. 459; *Seiter v. Mowe*, 182 Ill. 351, 81 Ill. App. 297; *Windstanley v. Second Bank*, 13 Ind. App. 544; *Robinson v. Woodward*, 28 Ky. Law Rep. 1142; *Englar v. Offutt*, 70 Md. 78; *Drovers Bank v. Roller*, 85 Md. 495; *Little v. Chadwick*, 151 Mass. 109; *Bishop v. Mahoney*, 70 Minn. 238; *Twohy v. Melbye*, 78 Minn. 357; *Shields v. Thomas*, 71 Miss. 260; *Lincoln v. Morrison*, 64 Neb. 822 (overruling earlier Nebraska cases); *Perth Co. v. Middlesex Bank*, 60 N. J. Eq. 84; *Ellicott v. Kuhl*, 60 N. J. Eq. 333; *O'Callaghan's App.* 64 N. J. Eq. 287; *Re Cavin*, 105 N. Y. 256; *Re North Bank*, 60 Hun (N. Y.) 91; *Atkinson v. Rochester Co.*, 114 N. Y. 168; *People v. American Co.*, 2 N. Y. App. Div. 193; *Cole v. Cole*, 54 N. Y. App. Div. 37; *Re Hicks*, 170 N. Y. 195; *Northern Co. v. Clark*, 3 N. Dak. 26; *Ferchen v. Arndt*, 26 Ore. 121; *Muhlenberg v. N. W. Co.*, 26 Ore. 132; *Re Assignment*, 32 Ore. 84; *Freiberg v. Stoddard*, 161 Pa. 259; *Lebanon Bank*, 166 Pa. 622; *Slater v. Oriental Mills*, 18 R. I. 352; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; *Nonotuck Co. v. Flanders*, 87 Wis. 237 (overruling the earlier Wisconsin cases); *Burnham v. Barth*, 89 Wis. 362; *Thuemmler v. Barth*, 89 Wis. 381; *Henika v. Heinemann*, 90 Wis. 478; *Gianella v. Momsen*, 90 Wis. 476; *Stevens v. Williams*, 91 Wis. 58; *Dowie v. Humphrey*, 91 Wis. 98; *Hyland v. Roe*, 111 Wis. 361; *State v. Foster*, 5 Wyo. 199, 215.

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CORPORATIONS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION. — A recent unanimous opinion from the Supreme Court of the United States contains an elaborate and forcible *dictum* to the effect that the privilege against self-incrimination is not extended to corporations by the Fifth Amendment to the Constitution. *Hale v. Henkle*, U. S. Sup. Ct., Mar. 12, 1906.

In England the principle "*nemo tenetur seipsum accusare*" is merely a rule of evidence, but in the United States it is a constitutional right.¹ This constitutional right is, however, only an enactment of the common-law doctrine,² and however differently expressed in the various constitutions, the same principle is enunciated by all.³ The application of this principle to corporations involves two questions: first, is there anything in the nature of the privilege that makes it inapplicable to corporations? secondly, is there anything in the nature of a corporation that unfits it for the privilege?

The privilege is in its nature personal, for no one can assert it except the one from whom the evidence is sought,⁴ and that one must be the person who is in danger of incrimination. An agent, provided he himself is in no danger of incrimination, cannot refuse to testify for fear of incriminating his principal, even though the principal be a corporation,⁵ though there is at least one case to the contrary, holding that the agent on the stand is the corporation on the stand.⁶ The Supreme Court, however, accepts the prevailing view, and if that is sound, it must follow logically that a corporation can

¹ *Counselman v. Hitchcock*, 142 U. S. 547.

² See Wigmore, *Ev.*, § 2252.

³ *Counselman v. Hitchcock*, *supra*, at 584-586.

⁴ *N. Y. Life Ins. Co. v. People*, 195 Ill. 430.

⁵ *Gibbons v. Proprietors of Waterloo Bridge*, 5 Price 491.

⁶ *Davies v. Lincoln Nat. Bank*, 4 N. Y. Supp. 373.

never be a witness, with a possible exception in the case of a bill of discovery filed directly against it. In such a case it has been held that a corporation is entitled to the privilege against self-incrimination.⁷ But bills of discovery apply only to civil cases,⁸ and it is therefore difficult to see how the corporation could assert the privilege in an investigation by the state, unless one adopts the apparently erroneous New York view that an officer on the stand represents the corporation. From the nature of the privilege, then, it is seen that the corporation may in one narrow class of cases be in a position to exercise it.

While, then, in a civil suit, it would seem that there is no reason for treating the corporation differently from a natural person, yet, in an investigation by the state, there is a difference arising from the very nature of a corporation and of corporate rights. The corporation receives its rights from the state and can act only in a manner prescribed by its creator. It has special privileges and franchises and must account for their use, and it would be subversive of justice to say that it could refuse to do so on the ground that it had abused them. Therefore, although a corporation is held by the principal case within the protection of the Fourth,⁹ and has been held within the protection of the Fourteenth Amendment,¹⁰ and probably would be protected by the clause in the Fifth forbidding double jeopardy, it would seem that its nature prevents it, as between it and the state, from receiving immunity from investigation and disclosure of its internal affairs.

THE GOVERNOR'S RIGHT TO SUE. — The executive power of the nation is lodged in the President, whereas that of the state is vested in a number of independent heads, each deriving his authority from the same source, the people. And while Supreme Court adjudications have tended to enlarge the scope of the presidential power, state decisions have strictly confined the governor, as one member of a multifarious executive, within his granted powers, denying him any inherent rights.¹ All state constitutions, but those of Massachusetts and New Hampshire, name as one of the duties of the governor that of seeing that the laws are faithfully executed.² The extent of the power thereby conferred was lately passed on by the Mississippi Supreme Court. The governor, believing a contract made by a state board to be in violation of the Constitution, called upon the attorney-general, who as a member of the board voted for the contract, to file a bill to enjoin its execution. Upon his refusal the governor himself brought suit

⁷ *Logan v. Penna. Rd. Co.*, 132 Pa. St. 403.

⁸ See *Logan v. Penna. Rd. Co.*, *supra*.

⁹ *Hale v. Henkle*, *supra*.

¹⁰ *Smyth v. Ames*, 169 U. S. 466.

¹ For a general discussion see Goodnow, *Administrative Law of the United States*, bk. II c. III; Wyman, *Administrative Law*, c. VIII, and cases cited, especially *Field v. People*, 3 Ill. 79.

² The Massachusetts constitution (c. II, art. 4) and the New Hampshire constitution (art. 61) contain somewhat similar provisions. The constitutions in force down to 1894 have been generally relied on. In Professor Goodnow's excellent recent treatise, p. 104, occurs this astonishing statement: "As a general thing there is no provision in the state constitutions similar to that to be found in the United States Constitution, which makes it the duty of the chief executive to see that the laws be faithfully executed."

in the name of the state. By a majority vote the court dismissed his bill. *Henry v. State*, 39 So. Rep. 856.⁸ The decision may be rested on the ground that the act to be restrained was discretionary with the board, and therefore not reviewable. Yet the jurisdictional question was discussed at length, and the power of the governor to file a bill under the circumstances is unequivocally denied by the majority opinion, which finds no warrant in the Constitution or in the Code for the governor's position. That official has been allowed to sue on bonds payable to the governor on behalf of the state, on the theory that the governor is a corporation sole.⁴ Again, for purposes of suit between states, he represents his state, and by a rule of the United States Supreme Court service is to be made on the governor and attorney-general of a state.⁶ A few states expressly authorize the governor to engage other counsel under certain disabilities of the attorney-general.⁶ But under the general duty to see to the execution of the laws he has no inherent right to execute the laws himself.⁷ He is, in fact, largely a supervisory official. But he may enforce the execution of the laws by the proper authority. Where the duty of another official is ministerial, the governor, and in many states any citizen, may bring mandamus for its performance.⁸

What, then, is the position of the attorney-general? His common-law duties as the law officer of the state are, in the absence of contrary provisions, his under the state constitutions.⁹ Upon him devolves the duty to protect the state's interests from unlawful encroachments and violations of its political rights. In all but seven states he is an elective official.¹⁰ That his office includes judicial as well as executive functions is attested by the fact that in about ten constitutions it is provided for under the judiciary clause. He is thus endowed with large, independent powers, and is responsible generally only to the people. Yet a few constitutions, such as that of Maryland, apparently place him under the governor's direction in regard to the propriety of bringing suit. By the Mississippi Code the governor may require him to proceed against defaulting county treasurers and to assist district-attorneys. But on failure in his duty of attending the Supreme Court terms the power to appoint counsel to represent the state is with the court. Of course, wherever the governor possesses directory power, he may enforce it by mandamus. But this does not allow him to bring suit himself to execute the functions placed by law in the attorney-general.¹¹ If the exercise of the power to bring suit is discretionary, the power must be vested

⁸ The case is criticised in 1 The Law 806.

⁴ *Gov. v. Allen*, 8 Humph. (Tenn.) 176.

⁶ *Grayson v. Virginia*, 3 Dall. (U. S.) 320. The right of the governor of Mississippi to sue in a foreign state is expressly given by statute. Rev. Code 1892, § 2167.

⁶ See *Alexander v. State*, 56 Ga. 478; *State v. Dubuclet*, 25 La. An. 161, 27 La. An. 293; *Orton v. State*, 12 Wis. 509.

⁷ *Shields v. Bennett*, 8 W. Va. 74, 89; cf. *In re Fire*, etc., Commissioners, 19 Col. 482; *In re Neagle*, 135 U. S. 1; *Cahill v. State Auditors*, 127 Mich. 487. For a collection of the authorities on the governor's implied power to engage counsel, see 55 L. R. A. 493, n.

⁸ *State v. Crawford*, 28 Fla. 441; *State v. Buchanan*, 24 W. Va. 362.

⁹ See *People v. Miner*, 2 Lans. (N. Y.) 396.

¹⁰ Delaware, New Jersey, Pennsylvania, Maine, New Hampshire, Wyoming, and Tennessee. In the last named state the appointive power lies with the Supreme Court.

¹¹ In Wisconsin it is held that even a private citizen may restrain the violation of a public law upon the attorney-general's refusal to act. *State v. Cunningham*, 83 Wis. 90.

in him absolutely, and not subject to the mandate of the governor. If the attorney-general is recusant or hostile to the state's interests, the remedy is in impeachment or in legislative aid.

CONTRACTS FOR DISPLAY ADVERTISEMENTS. — Where a landowner agrees for a valuable consideration to allow the display of a sign upon his premises, an important question arises as to the nature of the right thus created. Three lines of reasoning have been suggested by the cases which have arisen: that the agreement constitutes a lease;¹ that it amounts only to a license;² and that it gives rise to an easement. The last view is expressed in a recent decision of the Kentucky Court of Appeals. *Levy v. Louisville Gunning System*, 89 S. W. Rep. 528.

A permissive occupation conferring a legal possession is essential to the relation of landlord and tenant.³ A licensee, however, need not be and ordinarily is not in possession, but has the right to do an act or a series of acts on the land of his licensor.⁴ An advertiser does not acquire possession of the wall whereon his advertisement is posted, but simply gains a right to do certain acts on the land of another. Where this right is created by oral agreement, his position is that of a licensee. His right, therefore, is subject to be revoked at the pleasure of his licensor, though, where the license is founded on a valuable consideration and is given for a definite period, a premature revocation would give rise to a right of action for breach of contract.⁵ As a license is terminated by any act of the licensor showing an intention to revoke, a subsequent conveyance of any interest in the property inconsistent with the continued enjoyment of the licensee's right would amount to a revocation.⁶ Where, however, the agreement is under seal, the only square decision on the subject is to the effect that a right in gross is created in the nature of an easement,⁷ which is irrevocable by the grantor, is good against his subsequent grantee or lessee, and will be protected from interruption by a court of equity.⁸ Where the agreement is in writing not under seal, the advertiser acquires only the rights of a licensee, according to the present weight of authority. It is submitted, however, that the agreement is valid as a contract to grant an easement and should be specifically enforceable in equity,⁹ — at least in jurisdictions which recognize easements in gross.

In any event, whether easement or license, the grant of such a right by the lessee of premises would not be a breach of his covenant not to sub-let.¹⁰ But where a lessee with such a covenant leased the roof of a building together with the right to maintain a sign thereon, the parties manifestly created the relation of sub-lessee in violation of the covenant.¹¹ So, where

¹ *Snyder v. Hersberg*, 11 Phila. (Pa.) 200.

² *Wilson v. Travenor*, [1901] 1 Ch. 578; and see *Reynolds v. Van Beuren*, 155 N. Y.

120.

³ See *Jones, Landlord & Tenant*, § 40.

⁴ See *Cook v. Stearns*, 11 Mass. 533; *Jones, Landlord & Tenant*, § 36.

⁵ *Kerrison v. Smith*, [1897] 2 Q. B. 445.

⁶ *Eckerson v. Crippen*, 110 N. Y. 585.

⁷ *Willoughby v. Lawrence*, 116 Ill. 11.

⁸ *Gunning Co. v. Cusack*, 50 Ill. App. 290.

⁹ See *Gunning Co. v. Cusack*, *supra*; *Witherell v. Brobst*, 23 Ia. 586.

¹⁰ *Lowell v. Strahan*, 145 Mass. 1.

¹¹ See *Gude Co. v. Farley*, 28 N. Y. Misc. 184.

an advertiser who has acquired for a term of years such an easement as in the present case, fails to paint out or remove his sign at the end of his term, he is not liable for rent as a tenant holding over.¹² And since there can be no recovery quasi-contractually for the use and occupation of land unless the relation of landlord and tenant exists, it would seem that the landowner could not recover in such a situation.¹³

CAUSES OF ACTION ARISING FROM LAUDATORY WORDS.—Whether the substance of a publication which forms the subject-matter of a libel suit is laudatory or disparaging, true or false, is immaterial where the plaintiff's only complaint is that words, the utterance of which brings him into ridicule or contempt, have been falsely attributed to him; to make a person the spokesman of an interview,¹ or to affix his signature to an advertisement or poster full of self-praise and derogation of others, may, in effect, brand him as a braggart or a vilifier. Nor is it material that the publication only covertly suggests its emanation from the plaintiff without in words asserting his authorship,² if its position or the style of its composition makes plain the invidious implication. So, when in a case lately decided in Louisiana, it was alleged that a newspaper, knowing that the plaintiff's fellow physicians and the public viewed self-assertion and advertising as highly unprofessional, maliciously and with intent to injure the plaintiff published a laudatory account of a fabulous cure said to have been effected by him, the court properly held that the petition set forth a cause of action based upon the implication that the plaintiff had authorized the article in question. *Martin v. Nicholson Publishing Co.*, New Orleans Picayune, Jan. 5, 1906 (La. Sup. Ct.).

If this false implication is such as men in general consider disparaging, the offense is against reputation, and the publisher may properly be made to answer for defamation. But the right to reputation is not merely a vague right to the good opinion of the world in general; it is more specifically a right not to be so lowered in the estimation of one's community, one's profession, or even of any single individual, that damage shall result. Lying words or false suggestions that to most men seem laudatory or colorless may be grossly damaging in the eyes of a given group of persons, owing to local conditions, local prejudices, professional codes, or individual caprice. Two instances will illustrate. A defendant, in order to injure the plaintiff, falsely informs the latter's miserly relative that the plaintiff has been guilty of a certain generous act. The relative forthwith disinherits the plaintiff.³ Another defendant, with like evil intent, publishes in an orthodox village that the plaintiff is a dissenter, whereupon the villagers sedulously avoid his shop.⁴ So, to call an enemy a labor-leader, a capitalist, a negro, or a white man might do him injury in some quarters. Where words used with respect to the plaintiff are by common consent damaging, the publisher

¹² *Goldman v. N. Y. Advertising Co.*, 29 N. Y. Misc. 133.

¹³ See *Keener*, Quasi Contracts, 191, 192.

¹ *Stewart v. Swift Specific Co.*, 76 Ga. 280; *Allen v. News Publishing Co.*, 81 Wis. 120.

² *Pavesich v. New England, etc., Co.*, 122 Ga. 190.

³ See *Kelly v. Partington*, 5 B. & Ad. 645, 648.

⁴ See *Odgers*, Libel and Slander, 3rd ed., 97; *Gough v. Goldsmith*, 44 Wis. 262.

must know the impression they will produce ; hence in an action for defamation his knowledge is not a subject of inquiry. In the instances that have been cited, however, it would be unjust to allow recovery unless the publisher knew or had reason to know the disapproving mental attitude of his auditors or readers toward the idea his words convey. Hence in this latter class of cases courts might well, with Mr. Odgers, refuse to allow an action for defamation, and compel recourse to the inclusive action on the case.⁵ It appears unnecessary, however, further to require, as that learned authority does, a malicious intent or reckless indifference on the defendant's part to the ensuing injury.⁶ One may incur liability by violating with no evil intent⁷ the similar right of privacy, and it is urged that negligent misrepresentation causing damage should be ground for suit.⁸ The duty to abstain from words of the truth of which the speaker is not assured, and which he has reason to believe will injuriously affect another, does not seem onerous.⁹

A REPUDIATION OF THE DOCTRINE OF INCORPORATION BY REFERENCE. — The doctrine is firmly established in England that an unattested document will be admitted to probate with a will if referred to in the will as an existing document, and if actually in existence at the time of the execution of the will. This rule rests on the fiction that the unattested document is incorporated into the will by the reference, and is thus supported by the formalities attending the execution of the will itself.¹ It was sought to invoke this doctrine in New York to avoid the strict interpretation there obtaining of a statute similar to the English Wills Act, requiring the signature of the testator to appear at the end of the will. Because of the limited space in printed blanks wills had been drawn with some parts of the body of the will following the signature of the testator, and connected with the main part of the will by references. Wills so drawn were not in conformity with the statute as interpreted by the New York courts, which held that the statute referred to the physical, literal end of the writing,² and not, as the English courts tend to hold, to the end of the sequence of meaning.³ Such wills were held bad, on the ground that the doctrine of incorporation by reference did not apply.⁴

These decisions seem correct, for the doctrine of incorporation by reference should and does apply only to documents that are not an integral part of the will. In the cases mentioned, the writing following the signature was a part of the will itself, and it would seem incongruous to speak of incorporating it with that of which by the intention of the testator it was already a part. According to the New York interpretation of the statute, no part

⁵ See Odgers, *Libel and Slander*, 4th ed., 102 ; *Knight v. Blackford*, 3 Mackey (D. C.) 177.

⁶ But see *Spotorno v. Fourichon*, 40 La. An. 423 ; *Morasse v. Brochu*, 151 Mass. 567.

⁷ See *Pavesich v. New England, etc., Co.*, *supra*.

⁸ See 14 HARV. L. REV. 184.

⁹ See *Capital, etc., Bank v. Henty*, 7 App. Cas. 741, 772.

¹ *Allen v. Maddock*, 11 Moo. P. C. 427.

² *Matter of O'Neil*, 91 N. Y. 516 ; *Matter of Conway*, 124 N. Y. 455.

³ *Goods of Kimpton*, 3 Sw. & Tr. 427.

⁴ *Matter of Andrews*, 162 N. Y. 1 ; *contra*, *Baker's Appeal*, 107 Pa. St. 381.

of the will; not even the part that preceded the signature, would be admitted to probate, though the part subsequent to the signature were abandoned.⁵ The obvious reason is that the whole was a unit. On the other hand, reference to an extraneous document does not make it literally a part of the writing that refers to it, even though it be physically annexed, for it is only by a fiction that it is incorporated into the attested writing. In such a case the signature at the end of the will proper is a sufficient compliance with the statute; and this would seem to be true where the extraneous document is physically annexed after the signature as well as where it is physically separated. If the extraneous document is rejected because, for instance, the reference is too uncertain, the will itself will properly be admitted to probate.⁶ A recent decision of the Appellate Division of the Supreme Court of New York, however, rejected the whole doctrine of incorporation by reference, citing the above-mentioned cases as authorities, and failing to draw the distinction suggested. *In re Emmons' Will*, 96 N. Y. Supp. 506. This decision, then, must be considered an arbitrary repudiation of the English rule, previously accepted in New York⁷ as well as in many other jurisdictions in this country,⁸ and apparently rejected in none, though questioned in Connecticut.⁹ It is to be remarked, however, that the present case is supported by an unnoticed New York decision,¹⁰ to which there was no allusion in subsequent decisions, containing *dicta* accepting the doctrine of incorporation by reference.¹¹

THE RELATION BETWEEN BROKER AND PRINCIPAL IN MARGIN TRANSACTIONS. — It is customary for a broker purchasing stock on margin for a client by advancing upon interest the money required for the purchase in addition to the margin deposited, to have the shares registered in his own name, and, without attempting to keep separate the identical certificates purchased upon a particular client's order, to pledge them for his own debts.¹ Although these customs are well established, the American decisions interpreting them are not harmonious. Most courts, following New York decisions, describe the relation between principal and broker as that of pledgor and pledgee. The broker, it is held, acts properly in taking title to the stock in his own name.² Moreover, as shares of stock are fungible, he need not keep separate or retain those purchased for a particular customer; but he must keep under his control sufficient shares of a like kind

⁵ Matter of Hewitt, 91 N. Y. 261. But the strictness of this rule has been relaxed in cases where the part subsequent to the signature is held immaterial. *Baker v. Baker*, 51 Oh. St. 217.

⁶ *Wood v. Sawyer*, 61 N. C. 251.

⁷ *Tonnele v. Hall*, 4 N. Y. 140; cf. *Jackson v. Babcock*, 12 Johns. (N. Y.) 389, 394.

⁸ *Skinner v. American Bible Society*, 92 Wis. 209; *Newton v. Seaman's Friend Society*, 130 Mass. 91; *Fickle v. Snapp*, 97 Ind. 289; *Gerrish v. Gerrish*, 8 Ore. 351; *Pollock v. Glassell*, 2 Gratt. (Va.) 439, 468; *Harvy v. Chouteau*, 14 Mo. 587; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390. But cf. *Sharp v. Wallace*, 83 Ky. 581. See also *Johnson v. Clarkson*, 3 Rich. Eq. (S. C.) 305; *Hunt v. Evans*, 134 Ill. 496.

⁹ *Phelps v. Robbins*, 40 Conn. 250, 271; *Bryan's Appeal*, 77 Conn. 240.

¹⁰ *Booth v. Baptist Church*, 126 N. Y. 215, 247.

¹¹ See *Vogel v. Lehrtritter*, 139 N. Y. 223.

¹ 1 Dos Passos, *Stock-brokers and Stock-exchanges*, 187, 251; *Markham v. Jaudon*, 41 N. Y. 235, 239.

² *Horton v. Morgan*, 19 N. Y. 170.

to be able to make delivery at any time to all customers without being obliged to purchase in the market.⁸ Accordingly, it has recently been held that if he sells stock purchased for a customer without retaining other stock of a like kind and amount, he is guilty of conversion. *Content v. Banner*, 34 N. Y. L. J. 1899 (N. Y., Ct. App., Feb., 1906).⁴

Has the broker a right to repledge? At common law a pledgee has, apart from special agreement, no such right. Such an agreement, however, the courts generally imply in these cases by virtue of the general custom of repledging.⁵ But the broker is liable in conversion if he pledges for an amount greater than the customer's indebtedness.⁶ Dividends or assessments, though in the first instance received or paid by the broker as the record owner, are to be credited or charged to the client.⁷

The Massachusetts court, interpreting apparently identical customs, holds that the broker merely contracts to deliver stock to the customer in the future. The broker's duties under this view have not, however, been satisfactorily worked out. Obviously, though, unless restrained by special contract, he may pledge *ad libitum* stock purchased upon a customer's order.⁸ It is said that the broker's contract requires him to purchase the stock and to procure delivery.⁹ His contract, if it does not require such delivery, is illegal.¹⁰ It has been added, however, that though he must procure delivery, he need not retain under his control sufficient stock for all customers.¹¹ But it would seem that the customer contracts for a right to have stock actually held by the broker, and intends not to rely upon the financial ability of the broker to purchase it; for otherwise the contract would permit the broker to speculate at his client's expense. Even, however, if this be conceded, important practical differences would still exist between the New York and Massachusetts rules. Under the former rule the customer, upon a wrongful sale, can recover the value of the stock in conversion,¹² or affirm the sale and recover the proceeds;¹³ under the latter rule his recovery is for breach of contract. Under only the former does the customer, if the broker becomes insolvent, possess rights higher than those of a general creditor.¹⁴

The facts that the customer pays interest, bears the burden of assessments, and receives the benefit of dividends, and incurs the liability for depreciation, seem clearly to show an intention not to create merely a contract right to future delivery, but to vest in him the beneficial ownership of the stock, subject only to a security title in the broker. As the title to the stock is in the broker, it is more accurate to describe the transaction as a chattel mortgage than as a pledge. So to hold does not conflict with the conclusions reached by courts which regard the contract as one of pledge. The

⁸ See *Douglas v. Carpenter*, 17 N. Y. App. Div. 329, 335.

⁴ *Stenton v. Jerome*, 54 N. Y. 480; *Gillett v. Whiting*, 120 N. Y. 402.

⁵ *Skiff v. Stoddard*, 63 Conn. 198, 219.

⁶ *Douglas v. Carpenter*, *supra*.

⁷ See *Chase v. Boston*, 180 Mass. 458, 460.

⁸ See *Rice v. Winslow*, 180 Mass. 500, 503; *Wood v. Hayes*, 81 Mass. 375.

⁹ See *Chase v. Boston*, *supra*; *Covell v. Loud*, 135 Mass. 41, 43.

¹⁰ See *Marks v. Metropolitan Stock Exchange*, 181 Mass. 251; *Rice v. Winslow*, *supra*.

¹¹ See *In re Swift*, 105 Fed. Rep. 493, 498; *cf. Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120, 140.

¹² *Baker v. Drake*, 53 N. Y. 211; 66 N. Y. 518.

¹³ See *Taussig v. Hart*, 58 N. Y. 425, 429.

¹⁴ *Skiff v. Stoddard*, *supra*, at 224 *et seq.*

doctrine of fungible goods seems equally applicable to the relations of mortgage and pledge. If a mortgagee wrongfully disposes of chattels before or after tender of the amount due, the mortgagor may recover in conversion.¹⁵

MEASURE OF DAMAGES IN CONTRACTUAL ACTIONS. — In the leading case of *Hadley v. Baxendale*, decided in 1854, the rule was laid down that the damages recoverable in the ordinary action of contract are "such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach of it."¹ Few cases since have failed to apply the test thus formulated. But of a second proposition stated as a corollary in that case there has been no such unanimous approval. That proposition makes the defendant liable for damages naturally resulting from special circumstances where he had notice of such circumstances. High authorities have contended that mere notice to the defendant is not sufficient, that he must in effect agree to be responsible for the consequences of default under the special circumstances.² It is conceded, however, that in most cases the mere agreement to perform made by one having notice would be sufficient evidence to warrant a jury in finding that the defendant had in fact assumed the greater degree of liability.³ The logical consequence of this view is an argument that carriers, who by law are deprived of the option of refusing performance, cannot be held for damages arising under special circumstances, even though they may have notice thereof.⁴ The Supreme Court of Massachusetts in February declined to commit itself upon this question, contenting itself with a reference to an earlier opinion⁵ in which the point was suggested but not determined. *Weston v. Boston and Maine R. R. Co.*, 34 Banker and Tradesman 541.

The rule making the fact of notice merely evidence of consent to stand by the consequences rests upon a misconception of the nature of the obligation to pay damages, a misconception somewhat aided by the language quoted above from *Hadley v. Baxendale*. The theory is that the obligation arises from the intention of the parties, and that the test suggested is one which the law adopts as most likely to ascertain and effectuate that intention in the given instance.⁶ In fact, liability for damages is imposed by law, and is in no way consensual.⁷ How, indeed, could it be when ordinarily

¹⁵ *Eslow v. Mitchell*, 26 Mich. 500; *Pierce v. Hasbrouck*, 49 Ill. 23.

¹ *Per* Alderson, B., in *Hadley v. Baxendale*, 9 Exch. Rep. 341, 354.

² Willes, J., in *Horne v. Midland Railway Co.*, L. R. 7 C. P. 583, 591; Beal, Bailments, 663, 664; Benjamin, Sales, 6th Am. ed., 880; 2 Smith Lead. Cas., 11th Eng. ed., 541.

³ Mayne, Damages, 7th ed., 42.

⁴ Kelly, C. B., in *Horne v. Midland Railway Co.*, L. R. 8 C. P. 131, 136, 137; Mayne, Damages, 7th ed., 32, 42; Carver, Carriage of Goods by Sea, 4th ed., § 716.

⁵ *Loneragan v. Waldo*, 179 Mass. 135, 140.

⁶ See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 544, *per* Holmes, J.; *Loneragan v. Waldo*, *supra*, at 139, 140. *Cf.* *Industrial Works v. Mitchell*, 114 Mich. 29.

⁷ See Cotton, L. J., in *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. D. 670, 677; Pollock, Notes to Indian Contract Act 260; 1 Sutherland, Damages, 3rd ed., 163; and especially an able article on "The Rule in *Hadley v. Baxendale*," by F. E. Smith, 16 L. Quar. Rev. 275.

the parties to a contract have in mind its performance, not its breach?⁸ When the damages are assessed as those which it is reasonable to suppose that the parties had in mind, what is really meant is that the law, aiming at compensation but proceeding upon principles of justice, considers it fair to hold a defendant for damages which as a reasonable man he ought to have foreseen as likely to follow from a breach.⁹ What he in fact foresaw or contemplated is immaterial. Where special circumstances exist, notice is all important in determining whether the consequences were foreseeable to a reasonable man in the defendant's position; but the defendant's consent implied in fact is no more relevant in fixing the extent of his liability than is the existence of a contract implied in fact where recovery is sought upon quasi-contractual grounds. On principle it matters not if notice of the special circumstances which would make a breach especially disastrous comes to the defendant not from the plaintiff but through other channels.¹⁰ The carrier's inability to decline shipments must therefore be considered unimportant in determining his responsibility;¹¹ and despite the *dicta* of eminent authorities to the contrary, the result of most of the decided cases indicates that this is the law.¹²

THE CONSTITUTIONALITY OF THE FLAG LAWS.—In 1900 a manufacturer who had been adorning his cigar boxes with pictures of the national flag was indicted under an Illinois Act forbidding the use of such advertising methods except in art exhibitions. The court held¹ the statute unconstitutional as depriving the defendant of liberty without due process of law; as denying him equal protection of the laws, since art exhibitions were excepted; and as interfering in a matter which was exclusively the concern of Congress. In 1904 a similar statute was held unconstitutional in New York, the court taking the ground that it infringed existing property rights.² The case against the statutes was simple. They not only deprived people of the liberty of advertising in a certain way, but, if the flag advertisements were already in existence, they deprived people of property as well. This would plainly make them bad under the Fourteenth Amendment unless something could be found to take them out of its operation.

In September, 1905, the Massachusetts law forbidding the use of the state arms in advertising was upheld,³ and a manufacturer was convicted for

⁸ Professor Williston in 8 HARV. L. REV. 30; Cotton, L. J., in *Macmahon v. Field*, L. R. 7 Q. B. D. 591, 597.

⁹ This test is substantially that adopted in the Code Napoleon, Bk. III, Tit. III, §§ 1149, 1150, 1151, cited by Parke, B., in *Hadley v. Baxendale*, *ubi supra*, 346. Cf. La. Civil Code § 1934, and Pothier, Obligations, 2d Am. ed., 71 *et seq.*

¹⁰ See *Kelly, Maus & Co. v. La Crosse Carriage Co.*, 120 Wis. 84. Mr. Smith makes the forcible suggestion that imposing upon the carrier this liability notwithstanding his inability to refuse the contract is simply another illustration of the burdens which he must take along with his lucrative monopoly. 16 L. Quar. Rev. 283. But that the carrier should be allowed to charge higher rates, see 3 Sutherland, Damages, 3rd ed., 2715.

¹¹ *Missouri, etc., Ry. Co. v. Belcher*, 89 Tex. 428; *Deming v. R. R.*, 48 N. H. 455; *Railroad v. Cabinet Co.*, 104 Tenn. 568. Notice after performance has begun is too late. *Am. Express Co. v. Jennings*, 38 So. Rep. 374 (Miss.). As to how definite the notice must be see *Kelly, Maus & Co. v. La Crosse Carriage Co.*, *ubi supra*.

¹ *Ruhrstrat v. People*, 185 Ill. 133.

² *People v. Van de Carr*, 178 N. Y. 425.

³ *Commonwealth v. Sherman*, 75 N. E. Rep. 71 (Mass.).

using the great seal as a trademark. The court seems to have taken the position that the statute did not deprive the defendant of liberty, since he never had been free to use the state arms as he did. The objection to this theory is that before the passage of the statute state and national emblems had been used for advertising, and yet no one had ever been hindered in the practice, so that if the common law did in truth forbid it, such common law arose neither from custom nor judicial decision.

In October, 1905, under a statute of Nebraska similar to that of Illinois, a merchant was indicted for selling beer bottles with an image of the national flag upon them. *Halter v. State*, 105 N. W. Rep. 298. The court held that the statute was valid, and based this decision on the only tenable ground,⁴ that though the act involved a deprivation of liberty under the Fourteenth Amendment, it could be justified as an exercise of the police power, that by preventing the national symbol from falling into contempt, it fostered the great civic virtue of patriotism, — in short, that it was in defense of public morality. It was suggested⁵ some time before this decision that the principle lying back of these laws was really the same as that appearing in the case of *U. S. v. Gettysburg Electric Ry. Co.*,⁶ where the federal government was allowed to condemn for a park the Gettysburg battlefield. That decision can hardly be quarreled with, for clearly patriotism is as much the concern of the state as are the private virtues. But that the presence of an American flag and a sheaf of national standards on the decorative cover of a cigar box has any real tendency to destroy our love of country, or that one who in good faith sells such a box should find himself a criminal, seems hardly reasonable. The law does accomplish the result of sparing the æsthetic sense of the more cultured classes, but it is still doubtful if such a purpose falls within the police power.⁷ A principle which permits the suppression indiscriminately of any human activity, on the ground that it offends against the vague canons of good taste, may not become oppressive while it is honestly administered by dispassionate courts and legislators; but it does remove the last vestige of the rigid guarantee against oppressive legislation, for it is invoked as an addendum to a power which admittedly cuts across every constitutional provision with which it comes in conflict.⁸

RECENT CASES.

APPEAL AND ERROR — EFFECT OF CHANGE OF STATUTE ON MANDATE OF APPELLATE COURT REVERSING AND REMANDING CAUSE. — In an action by a collector to obtain taxes, the plaintiff was successful in the lower court. On appeal the upper court decreed that as the tax levy was invalid "the judgment is reversed and remanded." Subsequently, but before the mandate of the Supreme Court had been filed in the lower court, a statute was passed validating the levy. In accordance with the new statute the lower court again gave judg-

⁴ Cf. Freund, *Police Power*, § 183.

⁵ 4 Columbia L. Rev. 376.

⁶ 160 U. S. 668.

⁷ Cf. *Bostock v. Sams*, 95 Md. 400; *People v. Green*, 85 N. Y. App. Div. 400. *Contra*, *Att'y-Gen'l v. Williams*, 174 Mass. 476; cf. also 17 HARV. L. REV. 275.

⁸ For a note taking the opposite view, see 35 N. Y. L. J. 670 (Feb. 19, 1906).

ment for the plaintiff. *Held*, that the lower court committed error in disregarding the mandate of the Supreme Court. *Chicago, etc., Co. v. People ex rel. McCord*, 38 Chi. Leg. N. 235 (Ill., Sup. Ct., Feb. 20, 1906).

If a cause is reversed and remanded with specific directions to enter judgment for one or the other party, the function of the lower court is purely ministerial, and probably no discretion would be allowed even if a change of law occurred. *Cf. Tourville v. Wabash Rd. Co.*, 148 Mo. 614. On the other hand, it seems clear that if a case is reversed and remanded with directions that a new trial be allowed, or if being merely reversed and remanded, the opinion of the appellate court indicates that there should be a new trial, then the lower court should of course regard all changes of law made subsequent to the reversal. *Cf. Woolman v. Garrenger*, 2 Mont. 405. In the principal case, no specific directions were given, but it appeared from the opinion that judgment should be entered for the defendant. Therefore, apart from special circumstances, a new trial should not have been allowed. *Treadway v. Johnson*, 39 Mo. App. 176. However, the fact that, in the absence of specific directions, the lower court must exercise its judgment in deciding what action should be taken to conform to the opinion of the Supreme Court, ought to vest it with the necessary discretion to enable it to give effect to laws passed after the reversal.

BANKRUPTCY — NATIONAL BANKRUPT LAWS — STATEMENT OF CLAIM AS EVIDENCE. — A creditor proved his claim before a referee in bankruptcy by a sworn statement in writing, according to § 57 *a* of the Bankruptcy Act of 1898. The trustee objected to the claim and offered evidence against it. *Held*, that the sworn statement is *prima facie* proof of the indebtedness, and that, the trustee's evidence being insufficient to rebut it, the claim will be allowed. *Whitney v. Dresser*, U. S. Sup. Ct., Feb. 19, 1906.

The case is in harmony with the decisions of the district courts under the Bankruptcy Acts of 1867 and of 1898. *In re Shaw*, 109 Fed. Rep. 780; *In re Carter*, 138 Fed. Rep. 846. The former Act calls the statement of claim a deposition, while the latter drops that term; but, under either, the statement is no more than an affidavit. Neither a declaration, nor a statement of claim against the estate of a deceased person, has probative value though verified by affidavit. But the sworn statement in bankruptcy proceedings is regarded as evidence sufficient to make out a *prima facie* case, because of the wording of the statute and of the custom of bankruptcy courts. The statute terms the statement "proof," and provides for hearing objections to it, thus putting the burden of going forward on the objector. The burden of proof is not shifted, but until the objector has produced evidence sufficient to overcome the evidence thus offered in favor of the claim, the claimant need do nothing more. *In re Sumner*, 101 Fed. Rep. 224. As bankruptcy proceedings would be seriously delayed if a mere objection compelled the creditor to offer evidence, the balance of convenience is strongly in favor of the present rule.

BOARDING-HOUSES — LIABILITY OF BOARDING-HOUSE KEEPER — LOSS OF GUEST'S PROPERTY. — While the plaintiff was a guest in the defendant's boarding-house, her jewels were stolen from her room by another guest. There was evidence of want of care on the part of the defendant in providing keys to the rooms and in the selection of guests. *Held*, that a boarding-house keeper owes the duty of reasonable care for the safe-keeping of guests' baggage. *Scarborough v. Cosgrove*, [1905] 2 K. B. 805.

The liability of an innkeeper for the loss of his guests' baggage closely approaches that of an insurer. *Costery v. Nagle*, 83 Ga. 696, 6 L. R. A. 483; see 17 HARV. L. REV. 47. No such liability, however, is imposed upon a boarding-house keeper. *Manning v. Wells*, 9 Humph. (Tenn.) 746. Whether the latter is under any obligation for the safe custody of a guest's property is not well settled in England. It has been there held, however, in apparent conflict with the decision of the principal case, that a lodging-house keeper owes no duty in this respect. *Holder v. Soulby*, 8 C. B. (N. S.) 254. On the other hand, the American decisions on this point accord with the present case. *Smith v. Read*, 6 Daly (N. Y.) 33. An insurer's liability was originally imposed upon

innkeepers to protect travellers against loss at the hands of thieves with whom the innkeepers would often connive, and the risks of theft to which travellers are still subject have been deemed sufficient to warrant the continuance of the rule. While a boarding-house guest, being more permanently situated than a mere traveller, needs less protection than the latter, his risks would seem to be sufficiently great to require the exercise of reasonable care by the boarding-house keeper.

BROKERS — STOCKS CARRIED ON MARGINS — LIABILITY OF BROKER FOR SALE WITHOUT NOTICE TO CUSTOMER. — *Held*, that a sale by a broker of stock carried on margin, without notice to the customer of the time and place of sale, constitutes a conversion in the absence of a special agreement by the customer authorizing a sale without notice. *Content v. Barmer*, 34 N. Y. L. J. 1899 (N. Y., Ct. App., Feb., 1906). See NOTES, p. 529.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — After the plaintiff had been more than seven consecutive years absent from the state, he was presumed dead, and his estate was administered under a statute. The defendant, an executor of a testator who had left a legacy to which the plaintiff was entitled, paid the money to the latter's administrator. Later, the plaintiff appeared and demanded the legacy from the executor. *Held*, that he may recover it. *Selden's Executor v. Kennedy*, 52 S. E. Rep. 635 (Va.).

Aside from statute, the administration of the estate of a living person is absolutely void for lack of jurisdiction of the probate court. *Scott v. McNeal*, 154 U. S. 34; see *Griffith v. Frazier*, 8 Cranch (U. S.) 9, 23. Consequently, the validity of the payment by the defendant to the administrator must depend upon the constitutionality of the statute under which it was made. It was formerly said that the legislature could never authorize the administration of the estate of an absentee who was in fact living, without violating the "due process" clause of the Fourteenth Amendment. 11 HARV. L. REV. 264; *Clapp v. Houg*, 12 N. Dak. 600. Yet because a state, under its general authority to settle estates of deceased persons, is unable to administer estates of living persons, the conclusion does not follow that it lacks the very necessary power to provide by special legislation of a proper kind for administering the estates of those who are absent for an unreasonable time. And it has been held that, where the legislature provides for suitable notice and adequately safeguards the property of the absentee, it may confer upon its courts power to administer his estate, even though he be alive, after a reasonably long absence has raised the presumption of his death. *Cunnius v. Reading School District*, 198 U. S. 458. But the statute under review in the principal case failed to make any such provisions whatever.

CONSTITUTIONAL LAW — EMINENT DOMAIN — RIGHT OF WAY FOR MINING PURPOSES. — Under a Utah statute providing for the exercise of eminent domain to facilitate the working of mines, the defendant in error brought suit to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiff in error. The Supreme Court of Utah decided that this was a public use. *Held*, that this holding does not result in deprivation of property without due process of law within the meaning of the Fourteenth Amendment. *Strickley v. Highland Mining Co.*, 26 Sup. Ct. Rep. 301.

The court rests its decision on a late case upholding another Utah statute giving the right of condemnation for private irrigation ditches. *Clark v. Nash*, 198 U. S. 361; see 17 HARV. L. REV. 493; 6 COLUMBIA L. REV. 46. The local issue in all these cases is the troublesome question, — what constitutes a public use? See 15 HARV. L. REV. 399. Some recent adjudications seem still to adhere to the narrow test that the use must be by the public directly or by some quasi-public agency. See *Healy Lumber Co. v. Morris*, 33 Wash. 490. But however state courts may decide this, the federal question involved is whether a statute holding that a particular use is public for the purpose of taking private property, is so plainly unwarranted as to be in violation of the Fourteenth Amendment. While in *Clark v. Nash*, *supra*, the Supreme Court

expressly denied a possible inference that private property might be taken whenever the public interest may be promoted, the present opinion strongly tends that way in deferring very liberally to the public policy of a state, based on peculiar local conditions, as interpreted by legislature and state courts. The use here sustained as public is, however, in line with a suggestion of Professor Wambaugh, of the Harvard Law School, that the right of eminent domain may be exercised to enable individuals more effectively to utilize the forces of nature.

CONSTITUTIONAL LAW — EVIDENCE — APPLICATION OF PRIVILEGE AGAINST SELF-INCRIMINATION TO CORPORATIONS. — *Seem*, that the privilege against self-incrimination contained in the Fifth Amendment to the Constitution does not extend to corporations which are being prosecuted by the State. *Hale v. Henkle*, U. S. Sup. Ct., March 12, 1906. See NOTES, p. 523.

CONSTITUTIONAL LAW — POWERS OF THE EXECUTIVE — GOVERNOR'S RIGHT TO SUE. — The attorney-general of Mississippi was requested by the governor to bring suit enjoining the carrying out of a contract by the board of control, deemed by the governor unconstitutional. Upon the attorney-general's refusal (though the record did not disclose the fact), the governor brought suit in the name of the State. *Held*, that the bill is dismissed. *Henry v. State*, 39 So. Rep. 856 (Miss.). See NOTES, p. 524.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — By Act of March 3, 1899, Congress provided that whenever the Secretary of War should have good reason to believe any railroad or other bridge to be an unreasonable obstruction to navigation, he should, after a proper hearing, require the parties controlling such bridge to make any necessary alterations. It was further provided that if the alterations were not made within the prescribed time, criminal proceedings should be taken. *Held*, that the Act is not unconstitutional as a delegation of legislative power by Congress. *United States v. Union Bridge Co.*, 36 Pitts. Leg. J. 197 (U. S. Dist. Ct., W. D. Pa., Feb. 9, 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 203.

DAMAGES — MEASURE OF DAMAGES — DAMAGES IN CONTRACTUAL ACTIONS. — The plaintiff sued the defendant carrier for negligent delay in the transportation of scenery. *Held*, that the measure of damages is the reasonable rental value of the property. As to whether, by giving notice of the special circumstances to the carrier, the plaintiff could have recovered special damages or special profits, *quære*. *Weston v. Boston and Maine Rd.*, 34 Banker and Tradesman 541 (Mass., Sup. Ct., Feb. 26, 1906). See NOTES, p. 531.

EASEMENTS — CONTRACT FOR DISPLAY ADVERTISEMENTS. — The owner of a building agreed in writing to allow the defendant to display a sign on the side of it for one year. Subsequently the owner leased the building to the plaintiff, who took with notice of the above contract. The plaintiff removed the defendant's sign and brought suit in equity to restrain the defendant from attempting to replace it. *Held*, that the contract created in the defendant a right in the nature of an easement, which was not terminated by the lease to the plaintiff. *Levy v. Louisville Gunning System*, 89 S. W. Rep. 528 (Ky., Ct. App.). See NOTES, p. 526.

EQUITY — CONSTRUCTIVE TRUSTS — STATUTE OF LIMITATIONS AS DEFENSE TO INNOCENT CONSTRUCTIVE TRUSTEE. — The complainant, as receiver in bankruptcy of a corporation, filed a bill against the stockholders of the company to recover, *inter alia*, certain dividends which had been paid out of capital, more than six years before. It appeared that the defendant Downs received these dividends without notice that they were improperly paid. *Held*, that Downs, though originally liable as a constructive trustee to refund, will be protected by the statute of limitations, since he received the dividends in good faith,

but that this defense will not avail the other stockholders who had notice. *Mills v. Hendershot*, 62 Atl. Rep. 542 (N. J., Ch.).

Equity is not bound by the analogy of the statute of limitations, but may in its discretion apply it. *Rugan v. Sabin*, 53 Fed. Rep. 415. When there are concurrent remedies at law and in equity, and the former is barred by the lapse of the statutory period, equity will where fair apply the analogy of the statute to the equitable remedy. *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90. Where dividends have been improperly paid out of capital it has been held that *assumpsit* lies at the instance of the company to recover them. *Cf. Lexington, etc., Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412. But where the dividends were received in good faith the lapse of the statutory period will be a bar both at law and in equity. *Lexington, etc., Ins. Co. v. Page & Richardson, supra*. It seems therefore that the defendant Downs is properly entitled to the benefit of the statute. But the other stockholders, who knowingly received their dividends without right, should not receive similar protection in equity. *Cf. Vane v. Vane*, L. R. 8 Ch. 383.

EQUITY — INJUNCTION — PROTECTION OF A VALUABLE TRADE SECRET. — The defendant Nichols contracted with the complainant to devote his entire time and skill during a period of five years to the business of the complainant and never to divulge a valuable trade secret entrusted to him. With full notice of this contract, the other defendant, the American Foundry Co., induced Nichols to enter their employment with intent to gain possession of the complainant's trade secret. The complainant sought an injunction against both defendants. *Held*, that since the injury to the complainant by a disclosure of its trade secret would be irreparable, it is entitled to an injunction restraining not only the defendant Nichols from making the disclosure, but also the defendant company from employing Nichols or using any information acquired from him. *Taylor Iron, etc., Co., v. Nichols*, 61 Atl. Rep. 946 (N. J., Ch.).

By the better view, one who invents or discovers a secret process has a property right therein which a court of chancery will protect both against one who in violation of his contract undertakes to disclose it to third parties, and against those who with notice seek to profit by such disclosure. *Peabody v. Norfolk*, 98 Mass. 452. That portion of the injunction which restrained Nichols from disclosing, and the defendant company from using, the complainant's trade secret, clearly falls within this rule. *Cf. Salomon v. Hertz*, 40 N. J. Eq. 400. But the court goes further, and while expressly refusing to enjoin Nichols from taking other employment, restrains this particular defendant from employing him. There seems to be no case directly in point, either for or against such additional relief. As both defendants have shown themselves to be unscrupulous, to permit such employment would give them an excellent opportunity to devise a means of violating the injunction in safety, and such violation would work irreparable injury to the complainant. The circumstances, therefore, clearly seem to warrant the fuller protection of the innocent party against probable affirmative harm.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BONDS — RIGHT OF SURETY TO PURCHASE PROPERTY OF ESTATE. — An administrator fraudulently procured an order from the probate court for the sale of land, and then sold it to the surety on his bond. The court approved the sale. *Held*, that the sale may be set aside at the suit of a devisee, though the surety was without notice of the fraud. *Fincke v. Bundrick*, 83 Pac. Rep. 403 (Kan.).

An administrator's sale to a stranger cannot be avoided by proof of fraud, if the purchaser is *bona fide*. *Adams v. Thomas*, 44 Ark. 267. In nearly all jurisdictions the sale is voidable, even though not fraudulent, if the administrator, judge, auctioneer, or administrator's attorney purchases, because of the moral obligation to avoid a conflict between self-interest and duty. *Cf. O'Dell v. Rogers*, 44 Wis. 136. The court in the present case uses the same argument to deprive sureties of the rights of ordinary *bona fide* purchasers, but as they have no duties in connection with the sale, the decision requires further explanation. The court, in suggesting that the surety promises that the administrator will perform

his duty and that he must make specific reparation for the administrator's default, overlooks the fact that the surety does not undertake that the administrator's duty will be performed, but rather to pay damages if it is not performed. The decision is without precedent and must rest on the ground that an administrator is inclined to favor his surety and that fraud is easily concealed. But a sale to the administrator's son is not voidable on that ground, and no reason of policy appears for applying a stricter rule to his surety. *Cain v. McGeenty*, 41 Minn. 194.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS AND DUTIES — RIGHT AND DUTY OF RETAINER. — A sole trustee died insolvent having misappropriated trust funds. His administratrix refused to assume the trust. Sometime thereafter she appointed new trustees, in accordance with statutory provisions, in whom, however, the trust property was not vested. These trustees asked that the administratrix be required to exercise her right of retainer in order to recoup the trust estate from the personal estate of the decedent. *Held*, that the right of retainer is a privilege which, under the circumstances, the administratrix could not be compelled to exercise. *In re Bennett*, 54 W. R. 237 (Eng., Ct. App., Dec. 5, 1905).

It is well established that a personal representative holding a claim, either legal or equitable, in trust for another, may exercise the right of retainer for the benefit of the trust fund. In the case of legal claims there are decisions, and of equitable claims, *dicta* to the effect that he must so exercise it at the instance of the *cestui que trust*. *Fox v. Garrett*, 28 Beav. 16; *cf. Sander v. Heathfield*, L. R. 19 Eq. 21; see LEWIN, TRUSTS, 9th ed., 1037. This position appears sound, since even though retainer be a privilege merely, it should be a privilege for those beneficially interested, since they, and not the personal representative, are injured by the latter's inability to bring an action. The present case exhibits a readiness to depart from this rule, and to disregard the *dicta* supporting the *cestui's* right to compel the retainer in the case of an equitable claim. Though the conduct of the administratrix in refusing the trust duties may seem open to question, yet as it has been decided that she may so act and as the *cestuis* or the new trustees might have proceeded against the estate for breach of trust, this case may perhaps be distinguished. *Legg v. Mackrell*, 2 De G. F. & J. 551; *In re Ridley*, [1904] 2 Ch. 774; *Hatherley v. Dunning*, 54 L. J. Ch. 900.

GOOD WILL — GOOD WILL AS PROPERTY — WHETHER MERELY AN ATTRIBUTE OF LAND. — A racecourse company contracted to transfer to a reorganized company its land, business, and good will for £32,792, £10,000 representing the value of the land alone. The prospect of enjoying the same position as the old company under licenses from the Australian Jockey Club chiefly constituted the good will. Race meetings and clubs, not racecourses, were licensed. A deed was executed, conveying only the real estate, for the consideration of £10,000. *Held*, that the good will is not separate property, but merely enhances the value of the land, and that therefore the deed is subject to a stamp tax on the full amount, £32,792. *In re The Rosehill Racecourse Co.*, 5 N. S. W. Rep. 402.

Good will is generally recognized to be a form of property. See 16 HARV. L. REV. 135; 15 Fed. Rep. 315, note; *contra, Elliott's Appeal*, 60 Pa. St. 161. It was originally regarded as purely local and hence inseparable from realty, but in this country the prevailing view is that mercantile good will may be distinct from the land upon which the business is conducted, and even from chattels employed in the business. See *People v. Roberts*, 159 N. Y. 70, 79; *Washburn v. Nat'l Wall-Paper Co.*, 81 Fed. Rep. 17. This view has support in England also. *Potter v. Commissioners*, 10 Exch. Rep. 147; but *cf. Commissioners v. Muller & Co.*, [1901] A. C. 217. Obviously, the value of real estate may itself be enhanced by connection with a business. *Cf. Ex parte Punnett*, 16 Ch. D. 226. But it may equally be enhanced by a neighboring business, and such appreciation seems distinct from good will. Accuracy, therefore, demands that the good will which is the subject of a particular transfer be examined to discover whether it inheres, for example, in land, chattels, trade or firm names, licenses, agencies,

or the grantor's covenants. It is probable that in the principal case it could be enjoyed upon other land and consequently was distinct property. Unless, therefore, by construction of the deed the good will be included in the description, it is difficult to see how it passed at all by that conveyance.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — LAUDATORY WORDS. — The defendant newspaper knew that physicians and a large part of the public considered advertising by a physician unprofessional, and one who advertised, a "quack." The plaintiff's petition alleged that, maliciously and with intent to injure him, the defendant published a laudatory account of an imaginary cure said to have been effected by the plaintiff, and that he was damaged in consequence thereof. *Held*, that the plaintiff states a valid cause of action based upon the implication that he had inspired the article. *Martin v. Nicholson Publishing Co.*, New Orleans Picayune, Jan. 5, 1906 (La., Sup. Ct.). See NOTES, p. 527.

LIBEL AND SLANDER — DAMAGES — SICKNESS CAUSED BY LIBEL AS ELEMENT OF DAMAGE. — The plaintiff brought this action of libel based on words libelous *per se*. The publication was without malevolence. In aggravation of damages the plaintiff was permitted to prove that the libel caused her acute mental distress as a result of which she became sick and unable to follow her profession. The jury awarded her \$3,000 damages. *Held*, that the verdict be set aside as excessive, since the fact that the libel caused sickness resulting in inability to follow a profession is a consequence too remote to be properly proved in aggravation of general damages. *Butler v. Hoboken Printing, etc., Co.*, 62 Atl. Rep. 272 (N. J., Sup. Ct.).

It is generally settled that in an action of libel only those damages may be recovered which are the proximate result of the libel. *Chamberlain v. Boyd*, 11 Q. B. D. 407. In determining what damages are "proximate" the courts have usually been rather strict. *Cf. Lynch v. Knight*, 9 H. L. Cas. 577. By the weight of authority, however, mental suffering is regarded as a proximate result of publishing a libel or slander, and as such it is a proper element to be considered by the jury in assessing general damages. *Chesley v. Thompson*, 137 Mass. 136. There is little authority as to whether sickness resulting from such mental anguish is a damage too remote to be the subject of recovery. In England and in New York the courts decline to hold it a sufficient special damage, where the words are not actionable *per se*. *Allsop v. Allsop*, 5 H. & N. 534; *Terwilliger v. Wands*, 17 N. Y. 54. A Texas case, however, permitted the jury to consider, presumably as an element of general damages, sickness and inability to labor resulting from slander. *Zeliff v. Jennings*, 61 Tex. 458. But the case at hand applies the English doctrine to the estimation of general damages in an action for words libelous *per se*.

MALICIOUS PROSECUTION — BASIS AND REQUISITES OF ACTION — COURT'S LACK OF JURISDICTION. — A writ of attachment in garnishee process was sued out maliciously and without probable cause from a court which had no jurisdiction, and damage resulted from the levy. *Held*, that an action for malicious prosecution will lie. *Ailstock v. Moore Lime Co.*, 52 S. E. Rep. 213 (Va.).

It is generally held that, notwithstanding a defect in the process, an action on the case for malicious prosecution may be maintained. *Ward v. Sutor*, 70 Tex. 343; *contra, Braveboy v. Cockfield*, 2 McMull. (S. C.) 270. But by the weight of authority, if the court before which the defendant made the charge or instituted the suit had no jurisdiction of the subject matter, malicious prosecution will not lie, on the ground that the proceedings were extra-judicial and merely an attempt at prosecution, and that trespass is the proper remedy. *Berger v. Saul*, 113 Ga. 869; *Vinson v. Flynn*, 64 Ark. 453. Yet the objection that technically there has been no prosecution applies equally well where the court lacked jurisdiction of the person; and in cases where the defendant does nothing more than apply for a warrant or for a writ, and in no way participates in the service thereof, it is not easy to see how he has committed a trespass. See *Marshall v. Betner*, 17 Ala. 832, 836. Since the defendant has maliciously and without probable cause set judicial machinery in motion against the plaintiff,

who has in fact suffered damage thereby, there seems to be no very grave difficulty in allowing case for malicious prosecution. *Cf. Autcliff v. June*, 81 Mich. 477.

MASTER AND SERVANT — FELLOW-SERVANT DOCTRINE — INJURIES TO PAUPERS COMPELLED TO LABOR. — A pauper inmate of a workhouse was compelled under penalty of law to work for the guardians. While thus employed he was injured by the negligence of another servant of the guardians. *Held*, that the fellow-servant doctrine does not apply, and that the pauper may recover from the guardians. *Tozeland v. Guardians*, 22 T. L. R. 300 (Eng., K. B. D., Feb. 14, 1906).

The fellow-servant rule has in effect established an exception in the law of agency to the general principle of *respondet superior* in the case of injuries tortiously inflicted upon one servant by another servant of the same master, upon the ground that as the danger of the latter's tortious conduct might reasonably have been foreseen, the risk is presumed to have been voluntarily assumed by the injured employee. Hence the doctrine should not apply to a servant who has no option to assume or to refuse these risks. Accordingly, there are strong *dicta* that the fellow-servant rule is not applicable to convicts compelled to labor for contractors. *Boswell v. Barnhart*, 96 Ga. 521; *cf. Buckalew v. Tennessee, etc., Co.*, 112 Ala. 146. Similar language in opinions in the cases of slaves and of English pilots is really not in point, since neither the slaves nor the pilots were servants at all, but respectively chattels and independent contractors. See *Scudder v. Woodbridge*, 1 Ga. 195; *cf. Pontou v. Wilmington, etc., Co.*, 6 Jones Law (N. C.) 245; *Smith v. Steele*, L. R. 10 Q. B. 125. The pauper seeks the workhouse under the stress of his poverty, and once there he must work as ordered. The court's conclusion is, therefore, clearly justified that the pauper had no real option about assuming the risks from which he suffers.

MASTER AND SERVANT — NEGLIGENCE — WHO IS AN INDEPENDENT CONTRACTOR. — The plaintiff, while employed by the defendant in stowing cotton on board a vessel, was injured by a bale which fell upon him through the negligence of other persons employed by the defendant upon the same work. He brought this action against the defendant, who denied responsibility upon the ground that the labor union, of which the plaintiff was a member, reserved the right to appoint the foreman in charge of the work, who in turn had power both to select the laborers and to superintend the work. *Held*, that since the responsibility of employers for injuries received by workmen rests upon their freedom to select and superintend the latter, the defendant is not liable. *Farmer v. Kearney*, 39 So. Rep. 967 (La.).

One who contracts with an independent contractor for the performance of an act which is not unlawful, a nuisance, or manifestly dangerous to third parties, is not liable, under the rule of *respondet superior*, for the negligence of such contractor or of his servants. *Murray v. Currie*, L. R. 6 C. P. 24. And the test usually applied to determine the relation to the defendant of the negligent party, whether servant or independent contractor, is whether the defendant retained the power of controlling the work in detail. *Murphey v. Carall*, 3 Hop. & C. 462; *Sadler v. Henlock*, 4 E. & B. 570. In the case at hand it appears that the defendant had the right neither to select the laborers nor to control the manner in which the work should be done. Whether the right to control rested with the foreman personally, or with the foreman as the officer and agent of the union is not clear. In either case it is plain that the defendant is not liable. *Cf. Murray v. Currie, supra*. Another fatal objection to the plaintiff's recovery could be based on the "fellow-servant" rule, which obtains in Louisiana. *Satterly v. Morgan*, 35 La. An. 1166.

NUISANCE — PRIVATE ACTION FOR PUBLIC NUISANCE — SPECIAL DAMAGE. — The plaintiff, a private citizen, sought to enjoin the defendant from excluding the plaintiff's cattle from government lands which the public had a right to use as a common for the pasturage of stock. The plaintiff proved no circumstances tending to show special damage to himself, other than the owner-

ship of land in the vicinity and a desire to avail himself of the right of common. *Held*, that this does not constitute such special damage as is necessary to support a private action for a public nuisance. *Wilkinson, etc., Co. v. McIlquham*, 83 Pac. Rep. 364 (Wyo.).

The usual broad statement of the law is that a private action for a public nuisance is maintainable only by one suffering thereby some special damage. A distinction, however, which seems valid, has been expressly recognized by some courts, and apparently unconsciously observed by many others. When the gist of the wrong is an injury to one's person or private property resulting from the alleged nuisance, a private action may be maintained even though that nuisance is indictable, and the plaintiff suffers no more damage than numerous other persons. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95. But when the gist of the wrong is a disturbance of a common and public right, then a private action lies only if the individual proves a special injury which is different from that suffered by the public in general and which is not too remote and consequential. See *Benjamin v. Storr*, L. R. 9 C. P. 400, 406. In applying these tests, each case must be considered on its own facts, although courts differ as to how consequential the particular injuries may be. *Cf. Wilkes v. Hungerford Market Co.*, 2 Bing. (N. C.) 281; *Ricket v. Metropolitan Ry. Co.*, L. R. 2 H. L. 175. All courts, however, would probably recognize the correctness of the present decision. *Cf. Winterbottom v. Lord Derby*, L. R. 2 Exch. 316.

NUISANCE — RECOVERY OF DAMAGES — RIGHT OF REVERSIONER. — As the result of the operation of a light and power plant, the owner of adjacent property suffered loss by being compelled to allow a reduction in rent upon making a renewal lease. He later filed a bill to prevent the continuance of the nuisance, and also asked for damages for loss of rent. After the bill was filed, but before trial, the nuisance was abated. *Held*, that he cannot recover damages. Three justices dissented. *Miller v. Edison, etc., Co.*, 34 N. Y. L. J. 1739 (N. Y., Ct. App., Feb. 6, 1906).

It has long been settled that a reversioner can recover for an injury to the inheritance, even though the tenant may have an action for injury to his particular estate on account of the same malfeasance. *Beddingfield v. Onslow*, 3 Lev. 209. But, in order to recover for a nuisance, it must be of such a permanent nature as necessarily to injure the reversion. *Simpson v. Savage*, 1 C. B. (N. S.) 347. Accordingly, the New York courts have allowed the reversioner to recover against the elevated railway, since, by its charter, it may remain indefinitely. *Kernochan v. New York Elevated Rd.*, 128 N. Y. 559. But where the nuisance is only temporary and affects only the present salable value of the reversion, the reversioner is held to have no claim, for the questionable reason that as a purchaser will always have a remedy when he enters into possession the price should not be diminished by such nuisance. *Rust v. Victoria, etc., Co.*, 36 Ch. D. 113. Conceding the correctness of that rule, which must now be regarded as established, the claim of the reversioner in the present case was justly refused. The law seems to proceed on the theory that the landlord should get full rent and let the tenant recover for injury to his possessory rights, rather than that the landlord should recover and reduce the rent.

PARTNERSHIP — RIGHTS OF PARTNERS INTER SE — RIGHTS OF DECEASED PARTNER'S REPRESENTATIVE AS AGAINST EQUITABLE MORTGAGEE. — A and B were partners under an agreement providing that upon the death of either, the surviving partner should take over the other's interests, paying his estate therefor. B, the surviving partner, executed an equitable mortgage, as security for a loan, on land which had been joint partnership estate. Subsequently B died insolvent, having failed to pay for A's interest in the business. A's executors claimed a lien on the proceeds of the real estate in priority to the mortgagee. *Held*, that the mortgagee has priority. *In re Bourne*, [1906] 1 Ch. 113.

The decision is unquestionably correct, but in its reasoning the court appears quite oblivious of both the reasoning and the decision of the House of Lords in a prior case. *Knox v. Gye*, L. R. 5 H. L. 656, 675; see also *Noyes v. Crawley*,

10 Ch. D. 31. According to that case, the right of a deceased partner's representative is a mere personal right to an accounting from the surviving partner, in no way attaching to the property. But the court in the present case rests its decision on the doctrine that the deceased partner's estate has an equitable lien on the partnership assets, and suggests that the surviving partner is an express trustee. See LINDLEY, PARTNERSHIP, 7th ed., 388. If the relation between the partners were a trust relation strictly, this decision would be questionable, for the executor's equity is prior, and the mortgagee's possession of title-deeds should not help him in the absence of any estoppel against the executor. See 30 SOL. JOUR. 72. An English commentator on this case concludes that only when the partnership agreement provides, as here, for the assumption by the survivor of the deceased partner's interest, can English conveyancers dispense with their custom of requiring the concurrence of the deceased partner's representative in a sale of land. 50 SOL. J. 307. According to *Knox v. Gye* the same conclusion would follow irrespective of the special agreement.

PATENTS — ASSIGNMENT — AGREEMENT TO ASSIGN FUTURE IMPROVEMENTS. — The defendant assigned to the plaintiff all the inventions he had already made in a certain art, including his inchoate patent rights therein, and agreed also to assign any future improvements on them he might make. This he failed to do. *Held*, that the contract will be specifically enforced. *Reece Folding Machine Co. v. Fenwick*, 140 Fed. Rep. 287 (C. C. A., First Circ.).

This case presents a legitimate application of the much abused doctrine of public policy. When by express agreement an inventor promises to assign any future improvement he may make on his original invention, whether the consideration for the original assignment is to cover also the assignment of future improvements, or whether he is to get merely nominal additional compensation, any inducement to improve the invention is wanting. Hence such an agreement seems inconsistent with the established policy of encouraging inventors. On the other hand, the consideration paid may give opportunity for investigation which the inventor would not otherwise enjoy. Furthermore, if the agreement to assign the patented improvement were not enforced, neither the inventor nor the assignee of the original patented invention could use it without the consent of the other, and the public would be entirely deprived of the benefit of it. *Royer v. Coupe*, 29 Fed. Rep. 358. In any case the agreement should be specifically enforced as being a reasonable protection to the buyer, in accordance with the analogy of a covenant, in the sale of a business and goodwill, not to engage in competition. *Maxim Nordenfellt, etc., Co. v. Nordenfellt*, [1893] 1 Ch. 630; *cf. Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — FLAG LAWS. — The defendant was indicted under a statute forbidding the use of the American flag for advertising. He pleaded that the law was unconstitutional under the Fourteenth Amendment. *Held*, that the statute is valid. *Halter v. State*, 105 N. W. Rep. 298 (Neb.). See NOTES, p. 532.

PUBLIC LANDS — BONA FIDE PURCHASER. — Certain persons apparently became entitled to patents from the United States Government in accordance with the Timber and Stone Act of June 3, 1873. They then conveyed to the defendant company, a *bona fide* purchaser, all the timber upon the lands. The patents were subsequently issued, but after their issue such fraud was discovered as to give the United States the right to cancel the patents as against the original entrymen. Meanwhile the defendant company had bought from the patentees the legal title to part of the land and had taken off all the timber. This was a bill to have the patents cancelled, both those which were still in possession of the original entrymen and those which had been conveyed to the defendant, and to compel the defendant to account for the timber it had taken. *Held*, that the defendant company is a "*bona fide* purchaser" within the meaning of the Act, and is therefore protected both as to the patents which it had purchased and as to the additional timber conveyed and taken. *United States v. Detroit Timber & Lumber Co.*, 26 Sup. Ct. Rep. 282.

The Act under which the parties acquired their rights provided that a *bona*

fide purchaser from the patentee should not be affected by the forfeiture to which fraud would subject the latter. But one who *bona fide* purchases from the entryman the equitable title merely, is not, by virtue of such purchase, within the protection of the Act. *Hawley v. Diller*, 20 Sup. Ct. Rep. 986. If, however, the entryman conveys his equitable estate, a subsequently acquired legal title will inure to the benefit of his grantee. *Magruder v. Esmay*, 35 Oh. St. 221; *SAND. & H. ARK. DIG.* § 699. The present case raises the question whether one in whom the legal title has thus vested after a purchase of the equitable title will be affected by the entryman's fraud. The decision that the purchaser should be protected seems clearly right. The circumstance that the value was given before the grantor acquired legal title is immaterial, and the fact that the fraud, if discovered, would have vitiated the original equitable estate cannot affect a *bona fide* purchaser in possession of the legal title. *Gibson v. Lenhart*, 101 Pa. 522.

RECEIVERS — POWER OF FEDERAL COURT TO APPOINT ANCILLARY RECEIVER IN BANKRUPTCY. — The National Bankruptcy Act of 1898, § 2 (3), (15), vested courts of bankruptcy with "original jurisdiction . . . within their respective territorial limits . . . to appoint receivers, . . . to take charge of the property of bankrupts after the filing of the petition and until . . . the trustee is qualified." One who had been appointed receiver in the district in which involuntary proceedings had been instituted, petitioned *ex parte* to be appointed ancillary receiver by another court in whose district the debtor owned property. *Held*, that the latter court has jurisdiction to make the appointment. *In re Benedict*, 15 Am. B. Rep. 232 (U. S. Dist. Ct., E. D. Wis., Aug. 14, 1905).

The power exercised in the principal case is not expressly conferred by the Bankruptcy Act. In general, a receiver appointed by a federal court has no standing beyond its territorial jurisdiction. See *Kirker v. Owings*, 98 Fed. Rep. 499. The Bankruptcy Act, as supplemented by the general orders of the Supreme Court, permits proceedings in but a single jurisdiction: General Orders in Bank. VI, 172 U. S. 653. Hence it is impossible to file independent involuntary petitions and to secure the appointment of primary receivers in each district where the debtor owns property. Unless, therefore, the power above exercised exists, property situated outside the jurisdiction in which involuntary proceedings are instituted, is at the mercy of the debtor and his creditors until a trustee is appointed. Ancillary receivers have been appointed under the present Act. *In re Sutter Bros.*, 131 Fed. Rep. 654; see *In re Schrom*, 97 Fed. Rep. 760; *In re Peiser*, 115 Fed. Rep. 199. The existence of the power, however, has been questioned. See *In re Williams*, 123 Fed. Rep. 321; *In re Williams*, 120 Fed. Rep. 38. Under the Bankruptcy Act of 1867, which did not expressly authorize receiverships, primary receivers were appointed. *Keenan v. Shannon*, Fed. Cas. 7640. In the absence, also, of any bankruptcy statute, federal courts in insolvency proceedings in equity appointed ancillary receivers. *Sullivan v. Sheehan*, 89 Fed. Rep. 247. The present Act confers upon bankruptcy courts "jurisdiction in equity," and seems impliedly to authorize the recognized and necessary equitable machinery of ancillary receiverships. See 18 HARV. L. REV. 519.

RESTRAINT OF TRADE — CONTRACTS NOT TO ENGAGE IN CERTAIN BUSINESS — ENFORCEABILITY BY BUYER SEEKING MONOPOLY. — The defendant sold out his fruit business to the plaintiff with an agreement not to compete with the latter, in terms which the court considered reasonable and hence not an improper restraint of trade. In proceedings for an injunction to restrain a breach of this agreement, the defense was set up that the plaintiff's object in taking the defendant's promise was to obtain a monopoly of the fruit business throughout the United States. *Held*, that the defendant may nevertheless be enjoined. *Camors-McConnell Co. v. McConnell*, 140 Fed. Rep. 412 (Circ. Ct., Dist. Ala.).

In an action at law upon a contract collateral to an illegal agreement, the plaintiff's recovery ordinarily depends upon his ability to establish his case without having recourse to the illegality. *Hatch v. Hanson*, 46 Mo. App. 323.

Thus, if the present plaintiff had been suing at law, he would by this test have been entitled to damages, in spite of the undoubted vice in his monopolistic intention. But the suggestion is made that as the plaintiff has chosen to seek equitable relief, equity will look into the surrounding circumstances and if it finds a taint of illegality will refuse redress, in accordance with the maxim that he who comes into equity must have clean hands. Equity in applying this maxim, however, ordinarily follows the legal analogy, and looks no further than the immediate transaction. 1 POMEROY, EQ. JURISP., § 399. The present case, in weighing the proximity of danger to the public rather than the motive of the plaintiff, reaches a desirable result which finds support elsewhere. Cf. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *contra*, *Lufkin Rule Co. v. Fringeli*, 57 Oh. St. 596. As these contracts come before the courts in the future, their monopolistic tendency is bound to receive more and more attention. The holdings as to their validity will probably rest less upon definite legal principles than upon considerations of public policy. Cf. *National Enameling, etc., Co. v. Haberman*, 120 Fed. Rep. 415; see 15 HARV. L. REV. 580.

RULE AGAINST PERPETUITIES — CLAUSE MODIFYING ABSOLUTE DEVISE — REJECTING PART OF CLAUSE AS TOO REMOTE. — A will devising land in trust for X absolutely, had a codicil cutting down X's interest to a life estate determinable on alienation, with a remainder after X's death, which was void as violating the rule against perpetuities. If X tried to alien, the income for the remainder of his life was to go over on a limitation which was also void for remoteness, but the trustees had authority to pay it to X's wife if they chose. *Held*, that the power to pay the income to X's wife on alienation is valid, but that X has an absolute interest subject to that power. *Smidmore v. Smidmore*, 5 N. S. W. Rep. 492.

An absolute devise followed by a modification which is too remote operates as though no modification were attempted, because the testator has made two expressions of his intention, and it is presumed that he wished the first to stand unless the second were valid. *Ring v. Hardwick*, 2 Beav. 352. The present case, by enforcing part of the modifying clause, goes further than the cases rejecting the whole clause. The latter make the division where the testator did, while the former makes a new division and disposes of the property in a way the testator at no time intended. There is little authority on the point, though a briefly reported Australian case is in accord. *O'Brien v. Trustees*, 6 Argus L. Rep. (C. N.) 2. It has been held that a provision in a void modifying clause that a devisee shall have a separate use is effective, though the rest of the clause is rejected. *Harvey v. Stracy*, 1 Drew. 73. The somewhat analogous question whether a power may be validly exercised within the limits of the rule against perpetuities, although no time limit was imposed by the donor, has been decided both ways. See GRAY, RULE AGAINST PERPETUITIES, 2d ed., § 481. The present case seems to be correct, for the testator's actual intention is less departed from when part of the modifying clause is retained, than when the devisee takes the absolute interest.

TRUSTS — CESTUI'S INTEREST IN RES — TRUSTEE'S NEGLIGENCE AS GROUND FOR ESTOPPEL. — A bill was filed by trustees against an innocent mortgagor to obtain the cancellation of a forged discharge of a mortgage and for a foreclosure. The defendant claimed that a negligent failure of the trustees to give prompt notice had barred their claim. *Held*, that the plaintiffs can recover, since the elements of an estoppel were probably not present, and independently of this, that trustees in their representative capacity cannot be estopped. *Vohmann v. Michel*, 96 N. Y. Supp. 309.

The court was probably correct in holding that the elements of an estoppel were absent, so that even if the plaintiffs had been suing for their own benefit they would have recovered. But assuming that the plaintiffs were personally barred, the question then arises whether the decision is right in allowing them to recover for their *cestui*. The general rule is that where a *cestui* seeks to enforce a claim against one who has dealt with his trustee, he must work out his rights through the trustee, and any defense, such as the statute of limita-

tions, which exists against the latter will equally defeat the *cestui*. *Ex parte Dale*, Buck 365; *Meeks v. Olpherts*, 100 U. S. 564. It may be contended that the defense of estoppel is analogous to a statutory bar, and that the claim, by whomsoever prosecuted, is absolutely annihilated thereby. *Cf. Lloyds Bank v. Bullock*, [1896] 2 Ch. 192. It is believed, however, that an estoppel being essentially a device created by equity, resembles an equitable cross-claim rather than a prohibition of the suit. Further, it is the generally established doctrine that the prior of two equities against the same person will prevail. Accordingly, since the *cestui's* equity was manifestly prior to the defendant's, the case properly allows the trustees to recover for him. *Cf. Marx v. Clisby*, 126 Ala. 107; *Keate v. Phillips*, 18 Ch. D. 560, 577.

TRUSTS FOR CHARITABLE USES — CY PRÈS AND THE VISITATORIAL POWER. — One MacKenzie conveyed certain real estate upon charitable trusts to be conducted under the care of the Presbytery of New Jersey. At the termination of those trusts the property was to vest, and did in fact vest, in the Presbytery of New Jersey upon similar trusts. Descendants of the original grantor filed a bill to restrain the Presbytery of New Jersey from using the property other than as stipulated by the deed of trust. *Held*, (1) that if compliance with the details of the trust has become impracticable the property should be administered for similar charities under the *cy près* doctrine, and (2) that since their ancestor granted away his visitatorial power the complainants have no standing in court. *MacKenzie v. Trustees of Presbytery of New Jersey*, 61 Atl. Rep. 1027 (N. J., Ct. Er. & App.).

Other cases in New Jersey have apparently been decided upon *cy près* principles. *Newark v. Stockton*, 44 N. J. Eq. 179; *Pennington v. Metropolitan Mus. of Art*, 65 N. J. Eq. 11. But the state is now for the first time added to the short list of jurisdictions that expressly recognize the *cy près* doctrine as applied to charitable trusts. See 3 POMEROY, EQ. JURISP., §§ 1027-1029. The power of visitation or direction of charitable corporations may be retained by the founder and his heirs, but is most often granted to third persons. See TUDOR, CHARIT. TRUSTS, 3d ed., 72 *et seq.*: *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 673-674. Upon the failure of the appointees longer to hold the visitatorial office, as here, where the property itself vests in them, it seems advisable that the power should be exercised by the attorney-general in the name of the state as the protector of charities. *Rex v. Bishop of Chester*, 2 Stra. 797. The probable number of the heirs and their remote interest make its exercise by them inconvenient. Any suit with reference to the administration of this charity, it is held, should have been brought in the name of the attorney-general on the relation of the complainants, or by the Presbytery in a bill for instructions.

WILLS — INCORPORATION BY REFERENCE — WILLS ACT. — A testator had made a will which was void for lack of the required attestation. Later he executed a valid codicil referring to the previous document. *Held*, that as the doctrine of incorporation by reference does not obtain in New York, the codicil alone will be admitted to probate. *In re Emmons' Will*, 96 N. Y. Supp. 506 (App. Div.). See NOTES, p. 528.

WITNESSES — COMPETENCY IN GENERAL — HUSBAND AND WIFE — INDICTMENT FOR KILLING CHILD. — Under an indictment for murder the defendant was accused of having shot and killed his child, a baby fourteen months old, at the time in its mother's arms. The wife gave evidence, at the instance of the state, against her husband, who was convicted. *Held*, that the admission of the wife's testimony was error for which a new trial should be granted. Two justices dissented. *State v. Woodrow*, 52 S. E. Rep. 545 (W. Va.).

The established doctrine of the common law that one spouse cannot testify against the other was based upon grounds of public policy, the idea being that domestic concord would be disturbed by compelling or permitting such testimony. See 3 WIGMORE, EV. §§ 2227-8. It was perceived, however, that at least in cases of personal injury done by one to the other, an exception to the

rule must be made; otherwise domestic privacy would deprive the weaker of the law's protection against the violence of the stronger. *Lord Audley's Case*, 3 How. St. Tr. 402. The principle of this exception seems applicable to the present case, though no actual authorities have been found squarely in point. Cf. *Clarke v. State*, 117 Ala. 1. The subjection of an infant of tender years to the power of its parents is even more complete than that of either spouse to the other. Moreover, if the parents cannot testify against one another, such an infant is equally without the protection which the probability of discovery would otherwise afford. This general topic has been very widely affected by statutes. See 1 WIGMORE, EV. § 488.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

DESTRUCTIBILITY OF CONTINGENT REMAINDERS.—The rule was early laid down that devises of contingent future estates which, according to the state of affairs at the testator's death, were capable of taking effect as remainders, would be held to be contingent remainders, and not executory devises. *Carwardine v. Carwardine*, 1 Eden 34 (1757). Thus, where a future interest was limited upon a contingency which might happen either before or after the termination of the particular estate, it was held to be a contingent remainder. The result was to bring into operation the principle that a contingent remainder fails absolutely unless it vests during the continuance of the particular estate or at the instant of its termination. Whether the testator's intention is accomplished or defeated by holding the future interest in this class of cases to be a destructible contingent remainder, is the subject of a series of interesting essays in the *Law Quarterly Review*. *Contingent Future Interests, after a Particular Estate of Freehold*, by Albert Martin Kales, 21 L. Quar. Rev. 118. *Future Interests in Land*, by Edward Jenks, 20 *ibid.* 280; 21 *ibid.* 265.

Mr. Kales lays down two theses: first, the rule requiring future interests to take effect as contingent remainders or fail entirely, is not a rule of construction designed to ascertain the testator's intention, but is, rather, like the rule in *Shelley's case*, an absolute rule of law often defeating his intention; second, the rule itself has been abrogated without the aid of statute, and destructible contingent remainders no longer exist. He maintains that when a future contingent interest is limited after a particular estate, upon a contingency which may happen either before or after the particular estate ends, the language used, in the absence of any expressions to the contrary, shows an intent that the future interest shall take effect whenever the contingency occurs, regardless of the time of termination of the particular estate. In *Festing v. Allen*, [12 M. & W. 279 (1843)] the limitation was substantially to A for life, and after her death to all her children who should attain twenty-one. In *In re Lechmere and Lloyd* [18 Ch. D. 514 (1881)] the limitation was to A for life, and after her death to such children of A as, either before or after her death, should attain twenty-one. In the former decision, the limitation was held to create a contingent remainder; in the latter, an executory devise. But the intention, the writer argues, is as clearly expressed in the first case as in the second, that the future interest "take effect when the event happens without reference to the termination of the preceding interest." The rule requiring contingent future interests to take effect "by way of succession," *i. e.* as contingent remainders, was established prior to the Statutes of Uses and of Wills, when no other form of contingent future estate was legal. These statutes, however, made it possible for such interests to take effect "by way of interruption," *i. e.* as executory devises; and executory devises were held indestructible. See *Pells v. Brown*, Cro. Jac. 590 (1620). Where the contingency upon which the future estate was

dependent occurred after the particular estate ended, the interest could now take effect as an executory devise; but the courts still blindly held to the rule, that if the contingency might possibly occur before or at the termination of the preceding estate, the interest must be held a contingent remainder, and so destructible. Every future interest which has been held a contingent remainder will, however, be found to have been limited upon a contingency which might have occurred either before or after the termination of the particular estate. The logical result of *In re Lechmere* and *Lloyd*, and the later decisions,¹ holding such an interest not a contingent remainder, is, therefore, that the rule has been abrogated, and there exist to-day practically no contingent remainders, *i. e.*, contingent future interests which must take effect by way of succession.

Mr. Jenks, on the other hand, maintains that the rule discussed above faithfully carries out the testator's intention, and is still law. It is erroneous, says he, to suppose the rule "to imply that the same limitation might conceivably be construed both as a remainder and as an executory interest." Unquestionably the same limitation cannot take effect both as a contingent remainder and as an executory devise. This is, however, no objection to holding that the limitation shall take effect as a contingent remainder if the contingency occurs before the particular estate ends; and as an executory devise if the contingency occurs afterwards. Mr. Jenks contends that the essence of a contingent remainder is that "it was clearly intended to take effect on, and only on, the expiry of the particular estate—in other words, by way of succession." But if the reason why a contingent future interest capable of taking effect as a remainder, shall be construed as a contingent remainder, is because the testator intends it to be a remainder, then the rule is reduced to the empty formula, that the interest shall be construed to be what the testator intended it to be. What does Mr. Jenks mean by the intention that the interest shall take effect "by way of succession," *i. e.* as a remainder? If he means that the testator intends that the beneficiary shall not take if the contingency occurs after the particular estate ends, it is submitted that in fact no such expressed intention can be found in the cases in which the rule has been enforced. Mr. Jenks seems, however, to ascribe to the testator a more artificial intention. The testator is made to conceive of an estate in the abstract, apart from the beneficiaries designated by him, and to intend that it shall take effect, if at all, only at the instant when the particular estate ends. It seems more accurate in fact to say that he intends that after the expiration of the particular estate the beneficiaries described shall take a certain *quantum* of interest if a named contingency happens. If the contingency may obviously occur either before or after the preceding estate ends, and if the law permits the interest to take effect in the former event as a contingent remainder, and in the latter as an executory devise, then, unless such a desire is clearly expressed, it is a fiction to say that he intends the interest to take effect in the former alternative only.

WRITTEN AND UNWRITTEN CONSTITUTIONS IN THE UNITED STATES.—In deciding, in the case of *Dorr v. United States* (195 U. S. 138), that the right of trial by jury does not extend to the Philippine Islands, the Supreme Court of the United States has opened an entirely unsuspected field in American constitutional law, which Judge Emlin McClain has apparently been the first to explore. His able and suggestive essay furnishes the basis for a new chapter in the text-books on the subject. *Written and Unwritten Constitutions in the United States*, by Emlin McClain. 6 Columbia L. Rev. 69 (Feb., 1906).

The case of *Dorr v. United States* reaffirms and applies to the solution of the facts presented therein the principle decided in the *Insular Cases*, that the provisions of the Fifth and Sixth Amendments to the Federal Constitution guaranteeing common law procedure, including the right of indictment and trial by

¹ *Miles v. Jarvis*, 24 Ch. D. 633 (1883); *Dean v. Dean*, [1891] 3 Ch. 150; *Blackman v. Fysh*, [1892] 3 Ch. 209; *Battie-Wrightson v. Thomas*, [1904] 2 Ch. 95.

jury, do not extend to the inhabitants of our insular possessions. It would seem that this applies equally to all the territories of the United States. By section 3 of Article IV of the Constitution, Congress is given the power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." Therefore, it is suggested, there can be no distinction between the organized and the unorganized territories. The privileges guaranteed by the Bill of Rights in fact extend to the former only by virtue of an Act of Congress or a treaty provision. The conclusions of the Supreme Court, moreover, with reference to the Fifth and Sixth Amendments, seem equally applicable to the provisions of the other amendments. The court, indeed, quotes with approval from an earlier decision to the effect that the right of indictment and jury trial are not fundamental in their nature. See *Hawaii v. Mankichi*, 190 U. S. 197. Yet if the court is to determine what provisions are and what are not fundamental, it must do so not in accordance with any provisions contained in the Constitution itself, which makes no such distinction, but in accordance with some general principles of constitutional law not found in the written instrument, and therefore in the nature of an unwritten and evolved constitution. In legislating for the states, Congress is limited only by the terms of the written Constitution; in legislating for the territories its limitations are unwritten. Whence comes this evolved constitution? Its provisions, it is argued, are deduced by analogy from the provisions of our written Constitution, so far as they are applicable to the situation, and also, it may be, from the general principles of the unwritten constitution of Great Britain. But these restrictions, Judge McClain thinks, should not be applied by the courts, since their power to declare the acts of a co-ordinate branch of the government invalid extends only to such acts as contravene the provisions of the written Constitution. They must depend for their enforcement upon the same influences which have enforced the unwritten constitution of Great Britain. This result seems the wiser, also, because the application of these principles will involve broad questions of public policy pertaining rather to statesmanship than to legal theory, and therefore more germane to the executive and legislative branches than to the judicial department. Judge McClain concludes that whatever may be our opinions as to the responsibility of these branches of our government, it would seem unwise to recognize the paramount supremacy of the courts in enforcing such a constitution. This result, which follows as the corollary of the *Dorr* case, will give to the government of our newly acquired possessions the elasticity which is necessary in dealing with the novel conditions, and will also save our written Constitution the wrench which would be inevitable in fitting its provisions to a condition for which it was never intended.¹

PERSONAL NAMES. — The legal problem with regard to names arises usually in two classes of cases: in pleading, where there has been a misnomer in some process; and where a written instrument, such as negotiable paper or a deed, has been signed with a fictitious name. In these cases, if the party sued has used the name, the question is merely one of identifying him as the user and then applying doctrines of estoppel. See 2 BOUVIER, L. DICT., RAWLE'S REV., 463. A more fundamental question, involving the nature of a name and the right to its use, is presented when a man wishes to change his name permanently. This topic forms the basis of a late article in the *Yale Law Journal*, *Personal Names*, by G. S. Arnold, 15 *Yale L. J.* 227 (March, 1906). By a treatment somewhat historical, supplemented by a collection of authorities, the author shows that originally a name was only a convenient method of distinguishing individuals from one another, and, being selected arbitrarily by the bearer, could be abandoned at his caprice. This early common law doctrine persists to-day;

¹ As to whether there is an unwritten constitution which applies to the states as well, see *Unwritten Constitutions in the United States*, by Emlin McClain, 15 *HARV. L. REV.* 531. As to what constitutional rights are fundamental and what are not, see *The Legal Status of the Philippines*, by Lebbeus R. Wilfley, 14 *Yale L. J.* 266.

a change of name requires no particular formalities, such statutes as there are being merely permissive and not prohibitive. *Laftin and Rand Co. v. Steytler*, 146 Pa. St. 434. Mr. Arnold's conclusion seems to be that of the English writers, that the name of a person is a mere fact, not a legal right. It is the appellation by which one is known, and legally a person may have any name he can induce the public to use. See 26 SOL. J. 689. Even the fact that a man's name has been changed by the legislature does not compel the public to call him by his new name, but merely gives unequivocal and notorious beginning to its use. *Leigh v. Leigh*, 15 Ves., Jun., 92, 98. Assuming, then, that a man may change a name at will, are there any limitations upon the new choice? He may assume any name, even one similar to that of another person, provided it is not used to pass off his own wares or merchandise as those of that other. POLLOCK, TORTS, 7th ed., 156; ADDISON, TORTS, 7th ed., 575. The reason for this latter qualification is apparently the one pointed out by Mr. Arnold, that in a business a name may have assumed the nature of a quasi trade-mark.¹ That one can assume a name which happens to be the name of another person seems to follow from the proposition that a name is a mere fact. It is undeniable that the choice of the name of a person of reputed integrity and honor by one of dissolute and disreputable habits is harmful to him whose name is so used. But as there is no legal right injured, the remedy must come from the legislature, for at common law it is *damnum absque injuria*.² Such a choice of a name would be all the more reprehensible were it made merely from malice; but even in such a case it is at least questionable whether motive *per se* would make this act a legal wrong, no legal right being otherwise transgressed.

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- ARE NOTES OR OTHER UNEXECUTED OBLIGATIONS GIVEN TO A RAILROAD COMPANY TO INDUCE THE LOCATION OF STATIONS AT A GIVEN POINT VOID AS AGAINST PUBLIC POLICY? *M. C. Garber*. Pointing out and deprecating the tendency to uphold such obligations. 62 Cent. L. J. 164.
- BEGINNING OF LIABILITY OF A CARRIER OF GOODS, THE. *Joseph H. Beale, Jr.* 15 Yale L. J. 207. For a similar treatment of the beginning of liability of a Carrier of Passengers, see 19 HARV. L. REV. 250.
- BLACKMAIL AND EXTORTION. I. *James W. Osborne*. First in a series of articles treating the subject largely with reference to New York law. 4 Bench & Bar 50.
- CLOG ON THE EQUITY OF REDEMPTION. *Edmund G. Kaye*. Largely devoted to citation and discussion of English cases. 26 Can. L. T. 88.
- COMBINATIONS OF CONTRACTS RELATING TO THE SALE OF PERSONAL PROPERTY. *Edward S. Rapallo*. Discussing the question whether descriptions of property sold constitute collateral warranties or are part of one indivisible contract. 14 Am. Law. 52.
- CONSTITUTIONALITY OF STATE LICENSE LAWS FOR THE PRIVILEGE OF DOING BUSINESS, INVOLVING CLASSIFICATION AND DISCRIMINATION, THE. *Eugene McQuillin*. A brief statement of the results of some of the decisions. 62 Cent. L. J. 124.
- CONSTITUTIONALITY OF STATE STATUTES CONFERRING LIENS ON SHIPPING, THE. *William B. Gillmore*. A collection of cases with summary of conclusions drawn therefrom. 29 N. J. L. J. 37.
- CONTINGENT FUTURE INTERESTS AFTER A PARTICULAR ESTATE OF FREEHOLD. *Albert Martin Kales*. 21 L. Quar. Rev. 118. See *supra*.
- DECISIONS AND LEGISLATION AFFECTING CORPORATIONS DURING 1905. *Athelstan Vaughan*. 31 Nat. Corp. Rep. 946.
- EFFECT OF FOREIGN CHATTEL MORTGAGES UPON THE RIGHTS OF SUBSEQUENT PURCHASERS AND CREDITORS, THE. *Marion Griffin*. 4 Mich. L. Rev. 358. See 18 HARV. L. REV. 145.
- EXAMINATIONS BEFORE TRIAL TO FRAME PLEADINGS. II. *Raymond D. Thurber*. Stating the practice in New York state. 4 Bench & Bar 60.

¹ For a discussion of the law on this point, see 18 HARV. L. REV. 56, 318.

² It could hardly be contended that the right to a name falls within the very shadowy limits sought to be established for the so-called right to privacy. For a general discussion of the latter right, see *The Right to Privacy*, by Samuel D. Warren and Louis D. Brandeis, 4 HARV. L. REV. 193.

- EXTRA-TERRITORIAL JURISDICTION IN CHINA. *Gustavus Ohlinger*. Discussing the system of consular courts in China. 4 Mich. L. Rev. 339.
- FREE CHURCH OF SCOTLAND CASE, THE. *Francis C. Lowell*. Discussing the case commented upon in 18 HARV. L. REV. 310. 6 Columbia L. Rev. 137.
- FUTURE INTERESTS IN LAND. *Edward Jenks*. 20 L. Quar. Rev.; 21 *ibid.* 265. See *supra*.
- GROWTH OF NEUTRAL RIGHTS AND DUTIES. *Edwin Maxy*. General discussion, largely historical. 14 Am. Law. 55.
- "HE SHALL SEE THAT THE LAWS ARE FAITHFULLY EXECUTED." *Anon.* Criticising a decision of the Mississippi Supreme Court. 1 (The) Law 806. See *supra*, p. 524.
- HOW SHOULD OUR LAW BOOKS BE WRITTEN? *Albert S. Bolles*. Advocating the fuller statement and comparison of the different rules prevailing in the various states. 15 Yale L. J. 221.
- INROAD UPON FIDUCIARY INTEGRITY, AN. *Edson R. Sunderland*. Deprecating several recent decisions that an insolvent executor need not pay a debt due from himself to the estate. 4 Mich. L. Rev. 349.
- INSURANCE AS A COMMODITY. *Eugene A. Gilmore*. Maintaining that the Federal Commerce Clause is restricted to the exchange of tangible objects and hence does not include insurance. 18 Green Bag 142. Cf. 19 HARV. L. REV. 142.
- LAW OF THE CONSTITUTION IN RELATION TO THE ELECTION OF PRESIDENT, THE. I, II. *J. Hampton Dougherty*. Pointing out weaknesses in the electoral system. 14 Am. Law. 21, 68.
- LIABILITY OF LESSOR OF RAILROAD FOR LESSEE'S NEGLIGENCE RESULTING IN INJURY TO LATTER'S EMPLOYEE. *Cyrus J. Wood*. Arguing for the lessor's liability. 62 Cent. L. J. 181.
- LIABILITY OF RECEIVING CARRIER FOR LOSS BEYOND ITS OWN LINE—CONSTITUTIONALITY OF THE VIRGINIA ACT. *A. W. Patterson*. Arguing against a decision holding an act imposing such liability unconstitutional as a restraint on the freedom to contract. 11 Va. L. Reg. 791.
- ORIGINAL PACKAGE INEPTITUDE, THE. *William Trickett*. Pointing out inconsistencies in, and difficulties in applying, the present Supreme Court doctrine. 6 Columbia L. Rev. 161. Cf. 18 HARV. L. REV. 547.
- PERSONAL NAMES. *G. S. Arnold*. 15 Yale L. J. 227. See *supra*.
- PROBLEM OF UNIFORM DIVORCE LAW IN THE UNITED STATES. *George Elliot Howard*. Advocating a uniform law to be obtained by action of the commissioners on uniform state legislation. 14 Am. Law. 15.
- PROPOSALS FOR THE AMENDMENT OF THE INTERSTATE COMMERCE ACT, THE. *John B. Daish*. A critical examination of the bills now pending in Congress. 18 Green Bag 150.
- RIGHT OF A SURVIVING PARTNER TO SELL REAL ESTATE WHICH BELONGED TO THE FIRM, THE. *T. Cyprian Williams*. Commenting upon a case in [1906] 1 Ch. 113. 50 Sol. J. 307. See *supra*, p. 541.
- SKETCH OF THE PRINCIPLES OF MOHAMMEDAN JURISPRUDENCE, A. I, II. *Abdur Rahim*. Brief, but comprehensive. 3 Calcutta L. J. 11n, 27n.
- TORRENS SYSTEM, THE. AN OPEN SYMPOSIUM. *Eugene C. Massie*. A series of communications discussing *pro* and *con* the practical merits of the Torrens System of Land Legislation. 11 Va. L. Reg. 570, 649, 707.
- VALIDITY OF INCREASING RATES IN INSURANCE ON THE ASSESSMENT PLAN, THE. *Anon.* Discussing a possible distinction between societies proceeding upon the assessment plan and ordinary fraternal associations. 1 (The) Law 743.
- WRITTEN AND UNWRITTEN CONSTITUTIONS IN THE UNITED STATES. *Emlin McClain*. 6 Columbia L. Rev. 69. See *supra*.

II. BOOK REVIEWS.

PRINCIPLES OF CONTRACTS AT LAW AND IN EQUITY. A Treatise on the General Principles concerning the Validity of Agreements. By Sir Frederick Pollock. Third American from the Seventh English Edition. With Annotations and Additions by the late Gustavus H. Wald and Samuel Williston. New York: Baker, Voorhis & Co. 1906. pp. cliv, 985. 8vo.

Upon this volume three masters of the law of Contracts have labored. Historical research, careful analysis, and an adequate investigation of modern cases here are combined. Each writer has furnished his portion of these three ingredi-

ents of a good legal text-book. It is well within the bounds of truth to say that in no other work is so much accurate information on the general principles of Contracts to be found.

The present edition contains two hundred and twenty-five pages of text more than Mr. Wald's last edition. About two-thirds of this additional matter consists of new chapters by Professor Williston. It is true that the larger part of these new chapters was already in print in articles in the law reviews. But the merit of these articles demanded that they should be made more accessible to the profession. That is now happily accomplished. Nowhere else will one find the rights of a third party on a contract made for his benefit, the results arising from the repudiation of a contract by one party, the principles concerning accord and satisfaction, or the effect of alteration upon written instruments so carefully and accurately explained.

Professor Williston's work, however, has not been confined to these large additions to the text. Practically every note has been altered either by adding citations of other cases or by further suggestive comments on the American authorities. Reference also is made to the important discussions of historical or peculiarly difficult questions which are contained in treatises and reviews.

This work is confined, and rightly, to the general principles of the law of Contracts. Sales, Negotiable Instruments, Partnership and other special subjects are excluded. By this means general principles are more forcefully presented. There are some matters, however, which might well have been, but were not included. A careful analysis and discussion of the law of so-called implied conditions or dependency of promises is greatly needed. Professor Langbein, in his Summary of Contracts, threw much light upon this matter, but some of his conclusions need modification in the light of recent authorities. Probably no one is so well prepared to do this piece of work as Professor Williston. Therefore it is to be regretted that he did not find time to include such a discussion among his additions to the present volume. It also strikes one as odd that no discussion of joint contracts appears. Again, a discussion of strikes and other interference by laborers as a ground of impossibility might have been included. But it is to be remembered that this is an edition of another's book, not an original work.

Nothing has interfered more with a systematic development of the law of Contracts by the courts than the notion that all problems in Contracts may be solved by simply discovering the intention of the parties. Unfortunately for this view, parties about to make a contract have usually neither the foresight nor the prudence to look ahead and contemplate all the possible states of fact which may arise during the life of the contract, and then to provide for each contingency. They think only of the more obvious possibilities and provide for them. When an owner agrees to sell a horse he does not usually think of its possible death before the time for delivery, and stipulate that if it dies he shall be released from liability to perform. In this, as in most cases of impossibility, the release is given as a matter of positive law and not because of the intention of the parties. Professor Williston has recognized this fundamental principle throughout his annotations. A simple illustration will suffice. In the note on page 323 it is made clear that the matter of implied conditions does not rest upon the intention of the parties. Several particular propositions in that subject are not consistent with any such notion.

An especially noteworthy passage is to be found on page 351. Courts often speak of the situation, where one party makes a substantial breach of the contract and the other thereupon stops performing on his side and sues for entire damages, as a rescission. To object to this and other like misuses of terms may seem merely hypercritical. But, as Professor Williston says, "Even so, words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas." The truth of this statement is all too clearly illustrated in the cases cited.

It may be added that the physical make-up of the book is also excellent.

C. B. W

AMERICAN RAILROAD RATES. By Walter Chadwick Noyes. Boston: Little, Brown & Company. 1905. pp. 277. 8vo.

The title-page of this work announces that the writer is a judge, president of a railroad and author of a well-known legal treatise. Scarcely less wide in range than the versatility of the author's talents is the selection of topics he has discussed. The first three chapters sketch in broad lines the established principles of economic theory which govern the adjustment of railway rates. Then follows a discussion of certain practical problems in the management of railroads. One chapter contains an excellent description of the method by which in actual practice the various articles of traffic are classified and tariffs adjusted. In another chapter are explained and illustrated the conditions which give rise to the practice of discrimination. Perhaps of most immediate interest to the lawyer is the running commentary made upon the legal questions raised by the various phases of rate-making discussed, which culminates in two special chapters entitled: "State Regulation of Rates" and "Federal Regulation of Rates." The legal duty of the railroad to the public is briefly discussed. The principal provisions of the Interstate Commerce Act and the leading decisions in interpretation thereof, are summarized, and the practical workings of the act criticised. After the passage of the act, the author asserts, "pooling was substantially abandoned," but discrimination has persisted in times of business depression when traffic was light, and no adequate relief is provided against unreasonable rates. The volume concludes with a temperate and well-considered inquiry into the expediency and constitutionality of federal regulation: "any effective measure of relief requires the progressive action of two tribunals: (1) the judicial question of the reasonableness of the rate complained of . . . (2) If a rate be judicially found to be unreasonable, the legislative power of making a new rate should be administered." The reasons for adopting this mode of procedure can, however, only be considerations of practical efficiency. Undoubtedly the determining in a controversy between parties litigant the reasonableness of an existing rate is a judicial function. Nevertheless, Congress has the power to create a commission whose duty shall be to ascertain the reasonableness of existing rates in order that their findings of fact may be used as a criterion in fixing a rate for the future. Judge Noyes maintains that inasmuch as the fixing of a reasonable rate for the future is a legislative function, any provision for a judicial review of the action of a commission in order to determine whether the rate fixed by the commission is reasonable, requires the exercise of non-judicial powers by the courts, and is unconstitutional. The importance of this contention is chiefly to enjoin caution in the choice of the language defining the judicial power of review. To determine whether limiting the charge of the carrier to a maximum rate fixed by a commission, deprives the carrier of property without due process of law, is conceded to be a judicial function. The test of the constitutionality of such a rate is whether its enforcement will prevent the company from earning a reasonable profit on the item of business affected. See *Railroad Commission Cases*, 116 U. S. 331; *Chicago, etc., Co. v. City of Chicago*, 199 Ill. 484, 547; 199 *ibid.* 579, 642. And it is not improbable that this same test may be adopted as the rule to guide the commission in determining what shall be a reasonable future rate, with the result that a review, in the strictest sense judicial, would be both common and necessary.

A TREATISE ON THE LAW OF DOMESTIC RELATIONS. By Joseph R. Long. St. Paul: Keefe-Davidson Company. 1905. pp. xiv. 455. 8vo.

"This book," says the author in his preface, "has been written to supply a need which I have personally felt as a teacher of law. In writing it I have kept my own students constantly in mind, and have endeavored to set forth those principles of the law which I thought they ought to know, in such a manner as to be readily grasped by them." The preface concludes with the hope that the book may not be wholly without value to the practitioner. The author has apparently written in accordance with his expressed purpose. As

a book for the lawyer in search of argument or authority, the work is not helpful. The citations are far from exhaustive and the analytical discussion of underlying principles is almost entirely omitted. The book consists mainly of a summary of the rules of law which govern the relations of the members of a family toward one another. While the disabilities of married women and infants, and other matters usually treated in more comprehensive treatises upon domestic relations, are of necessity touched upon incidentally, they are dismissed as briefly as their relation to the subject will permit. The rules of law are stated concisely and in the main clearly, but without much attempt at illustration or elaboration of detail. Theoretical discussions of the law, the weighing of reasons for or against the acceptance of a principle, and criticisms of the decisions as they stand are for the most part wanting. In fact, the book seems in most respects best adapted for use as a text-book in a law school in which the text-book method of instruction is employed, and in which the instructor intends to rely upon the class-room work for the purpose of supplying both the reasons underlying the settled law and the more particular applications of its principles.

One notes a few propositions which seem as they are stated to be somewhat misleading. For instance, in § 43 one reads that marriages between citizens of a state which have been declared by a state statute to be void, are held void although contracted in another state in which they are not prohibited. This seems to be an over-statement. A void marriage is no marriage at all. But a marriage contracted by citizens of Ohio in Kentucky in order to avoid the laws of Ohio, if valid in Kentucky, will be recognized as valid by all states other than Ohio. Again, in § 142 it is stated that the parties themselves are bound by a decree of divorce fraudulently obtained upon the voluntary appearance of both in a proceeding in a jurisdiction where neither had a domicile, and that they cannot avoid the decree in a collateral proceeding afterwards instituted in the state of their domicile. The author notes in the appended citations that *Andrews v. Andrews* (188 U. S. 14) is to the contrary. Inasmuch as the final decision as to the binding effect of a decree rendered in another state lies with the United States Supreme Court, it would seem that there is a patent inconsistency in the author's statements as to the law and as to the holding of *Andrews v. Andrews*. In the same section the author maintains that where a person goes to a state and resides there for the purpose of procuring a divorce, the divorce is invalid, as the plaintiff does not comply with the rule requiring him to have a *bona fide* domicile in the state in which suit is brought, and cites *Andrews v. Andrews* for the proposition. If it is intended to be laid down that a person who goes to a state and resides there with the intention of making it his home cannot procure a valid divorce in that state in case his motive in so doing was to take advantage of its divorce laws, it may well be doubted whether the proposition is law. Certainly *Andrews v. Andrews* goes rather on the ground that no domicile was acquired in South Dakota because of a lack of real intention to make a home there. Notwithstanding the defects of the work, however, it should prove useful to the elementary student as a concise and for the most part accurate statement of the law.

H. LEB. S.

THE LAW OF CRIMES. By John Wilder May. Third Edition, edited by Harry Augustus Bigelow. Boston: Little, Brown, & Company. 1905. pp. liv, 366. 8vo.

The present volume, which is a third edition of Mr. May's well known work on Criminal Law, introduces even more extensive changes than did the second edition by Prof. J. H. Beale, Jr. One hundred and fourteen new sections and parts of sections have been added. The pages of its text number three hundred and thirty-two as against three hundred and twenty-one in the second, and two hundred and twenty-eight in the first edition, while the number of cases cited has been increased, chiefly by the addition of the late authorities, from some eight hundred in the first, and two thousand in the second, to over thirty-six

hundred in the third edition. This disproportion in the growth of the citations and of the text has had the advantage of leaving the latter brief enough for the purposes of the student, while giving something of the fullness of authority needed by the practicing lawyer. The first part of the book is devoted to an exposition of the general principles underlying both common law and statutory crimes, such as intent, capacity, and justification. The second part gives a brief survey of criminal procedure, while the third consists of careful definition of all the principal crimes.

The author has the misleading though common habit, probably derived by false analogy from the English text writers, of citing single uncontradicted decisions of state courts as general law. At times, too, a case cited is not authority for the point of law which it is said to support,—as where the famous case of *Regina v. Keyn* (2 Ex. D. 63) is quoted to prove that a nation has a quasi-territorial jurisdiction for three miles from its shores. Yet the work has obviously been given real thought. It is not a mere rearrangement of the time-worn text-book fallacies for purposes of sale. Its statements of principle are clear and refreshingly brief. Where distinctions are shadowy or incapable of certain application, the author has had the courage to say so frankly, instead of inventing bizarre criteria which no court could be counted on to sustain. While the book may still be too brief to be of much service to the practicing lawyer in preparing any particular case, yet for the student and general reader it stands distinctly above the average and is perhaps the best available work.

THE CONSTITUTIONAL DECISIONS OF JOHN MARSHALL. Edited with an Introductory Essay, by Joseph P. Cotton, Jr. In two volumes. New York and London: G. P. Putnam's Sons. 1905. pp. xxxvi, 462; v, 464. 8vo.

If the editor of these volumes had intended to prepare the constitutional decisions of Marshall's time for the present use of lawyers, he would have had no difficulty in forming a plan. Lawyers want a head-note giving the *ratio decidendi*, then the original reporter's statement or an equivalent, then the arguments of counsel or an abstract, then all the opinions, whether concurring or dissenting, and finally notes citing all the later cases and other literature; and they care little for critical comment, being of the contented view that what is done is done. The task set before the present editor is the very different and more perplexing one of adapting cases to the uses of the general reader. His plan is to reprint merely the opinions of Marshall, omitting formal head-notes, the technical statement of the cases, the arguments of counsel, and, with a few exceptions, the concurring and dissenting opinions. His editorial additions do not give numerous citations, but give in an introductory essay a rather conventional view of Marshall and of contemporary history, and prefix to each opinion comments indicating the doctrine of the case, the mode in which the question arose, and the editor's estimate of Marshall's opinion and of the influence which that opinion has exercised. As judicial opinions are not written for laymen, and as laymen cannot be cured of a tendency to believe that a *dictum* is just as authoritative as the *ratio decidendi*, it seems doubtful whether it is just to a judge or useful to the public to take judicial opinions out of their habitat and to place them before the general reader. Yet if the task is to be attempted, there is much to be said in favor of the present editor's plan. In view of the difficulties encountered by him, it is disagreeable to call attention to apparent blemishes. The introductory essay, quite appropriately intended to be laudatory, gives the unfortunate impression that Marshall was the whole court and that his opinions were dictated by partisan bias, and fails to indicate that throughout two-thirds of his service most of his colleagues were not of his own political faith. Again, the comments on the several opinions express disapproval more freely than is the habit of the profession, and certainly must be strong meat for laymen; for the editor questions almost half of Marshall's constitutional opinions in the Supreme Court, including almost three-fourths of

those which have become famous. These may well be deemed the rather creditable slips of an enthusiast. Of a different class is the omission to do all that can be done to protect the general reader from laying too much stress upon *di ta*; but the truth is that to render judicial opinions safe reading for laymen is an almost impossible undertaking.

E. W.

CORPORATIONS. A Study of the Origin and Development of Great Business Combinations and of their Relation to the Authority of the State. By John P. Davis. In two volumes. New York and London: G. P. Putnam's Sons, 1905. pp. ix, 318; iii, 295. 8vo.

This work was designed as an historical introduction to a more extended treatise upon "the modern corporation question," an undertaking which was cut short by the author's death in 1903. The present volumes are confined to the earlier ecclesiastical, educational, and eleemosynary corporations, to guilds and municipal corporations, and to the chartered trading companies. The development of joint-stock enterprise in the nineteenth century and all modern phases of the corporation problem are practically untouched, so that nothing but the ambitious title suggests the purpose the author had in view.

The book expressly disclaims original historical research, and professes rather to be an interpretation "of existing and accessible historical material." But even of secondary sources the author had very imperfect command; and his narrative is confined chiefly to England, dealing with other countries only when some such work as Rashdall's "Universities in Europe" gives him a broader outlook upon the facts. Even in the case of England, however, he has failed to make the most of such writers as Pollock and Maitland. For the general reader who desires an account of the early development of English corporations the book may be of some value; to the serious student it will be of little use.

The superficial character of Mr. Davis's historical chapters is not calculated to give one confidence in his interpretation of the "nature of corporations" or in his exposition of "the legal view of corporations"; and, in point of fact, these interpretative chapters yield results that are neither strikingly new nor strikingly important. It would have been well, moreover, to have deferred the consideration of the relation of corporations to the state until the history of corporate enterprise in the nineteenth century had been adequately examined. As the volumes stand, they are hardly more successful in legal interpretation than in historical research. Finally, in the reading of the proof "the author's legal representative," to whom the work fell, has not been particularly faithful to his trust.

C. J. B.

HINTS FOR FORENSIC PRACTICE. A Monograph on Certain Rules Appertaining to the Subject of Judicial Proof. By Theodore F. C. Demarest. New York: The Banks Law Publishing Company. 1905. pp. x, 123. 12mo.

This book will be of practical value to the trial lawyers of New York. It treats of objections to evidence, of striking out and disregarding evidence, and of motions to direct and set aside verdicts. Particular attention is paid to the effect of general objections, and to the meaning of the familiar but often little understood phrase, "incompetent, irrelevant, and immaterial." The text consists largely of extracts from New York decisions arranged in a novel and convenient manner. Every quotation from a decision is followed by a "remark" in a separate paragraph, which points out the relation of that case to the development of the law, and at the end of the cases upon a particular point the author's conclusions appear in an excellent summary. The method is that of a law lecture under the case system, and the happy result should commend the plan to text-writers whenever the topic handled is sufficiently limited to permit its use. Although the principles involved in Mr. Demarest's work are simple, many lawyers practise for years without thoroughly understanding them, and his

analysis of the cases will make much easier a mastery of the points of practice which he discusses. It is to be regretted that he did not widen the scope of his treatise so that it would be of value to the profession at large.

A SHORT HISTORY OF ROMAN LAW. By Paul Frédéric Girard. Being the first part of his *Manuel Élémentaire de Droit Romain*. Translated by Augustus Henry Frazer Lefroy and John Home Cameron. Toronto: Canada Law Book Company. 1906. pp. v., 220. 12mo.

Since its first appearance in 1895 the *Manuel Élémentaire de Droit Romain* of M. Girard has been recognized as from every point of view one of the best brief works available for the study of Roman law, and English readers will welcome a translation of the excellent historical introduction. The little volume is of about the same length as the historical chapters of Sohm's *Institutes*, but the method of treatment of the two jurists is so different that students will need to refer to both books. Moreover the general bibliography which M. Girard's translators have included has no parallel in the other manuals, and forms an admirable guide to the ancient and modern literature of the subject. The translation is faithful, though at times too literal for English idiom, and it is to be hoped that Messrs. Lefroy and Cameron will feel sufficiently encouraged to translate the remaining portion of the work.

C. H. H.

THE AMERICAN LAW RELATING TO INCOME AND PRINCIPAL. By Edwin A. Howes, Jr. Boston: Little, Brown, and Company. 1905. pp. xviii, 104. 12mo.

This small volume explains in detail the rules of law which control the separation of the returns from trust investments into income and principal. The subjects treated include the ownership of dividends on stock, the duty of the trustee to preserve the *corpus* intact, the apportionment of loss or profit, the determination of the moment when enjoyment of income begins, and the apportionment of current income between life tenant and remainderman. While no attempt is made to deal with theoretical problems of law, the statement of principles is clear and accurate, and is couched in untechnical language. Hence laymen as well as lawyers should find the book useful.

THE CONSTITUTIONAL HISTORY OF NEW YORK, from the Beginning of the Colonial Period to the year 1905, showing the Origin, Development, and Judicial Construction of the Constitution. By Charles Z. Lincoln. In five volumes. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1906. pp. xxx, 756; xvii, 725; xviii, 757; xxvi, 800; 547-8vo.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS, created under the "Business Corporation Acts" of the several States and Territories of the United States. By Thomas Gold Frost. Second Edition, enlarged and revised to January 1, 1906. Boston: Little, Brown, and Company. 1906. pp. xv, 698. 8vo.

STREET RAILWAY REPORTS ANNOTATED, reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by Frank B. Gilbert. Volume III. Albany, N. Y.: Matthew Bender & Company. 1906. pp. xxvi, 1010. 8vo.

CURRENT LAW: A Complete Encyclopedia of New Law. Volume IV., Indictment to Witnesses. George Foster Longsdorf, Editor; Walter H. Shumaker, Associate. St. Paul, Minn.: Keefe-Davidson Company. 1905. xv, 1971. 4to.

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TRANSFERS OF AFTER-ACQUIRED PERSONAL PROPERTY.

THE effect of a contract to sell, pledge, or mortgage personal property which either has not been identified or has not come into existence at the time—"future goods," as the English Sale of Goods Act calls such property¹—is not the same in all jurisdictions. This is partly due to the fact that several legal principles bear upon the question which are themselves the subject of much dispute.

Of course the party aggrieved has an action at law for damages if such a contract is broken, but the troublesome question is, whether equity will base upon this contract a property right, and if so, of what nature and to what extent. Such rights conceivably might be granted on either of two grounds: (1) the enforcement of specific performance of the contract, resulting in effect in an equitable lien upon the property; (2) the imposition of an equitable lien upon the property,—not upon principles of specific performance, but on a broad and somewhat indefinite principle that one who has parted with money or property expecting a specified return should be assured either that return or the redelivery of what he parted with. On this ground in England and in some states of this country an equitable lien is given on real estate for the purchase price both to an unpaid vendor,² and to a vendee who has paid the price or a portion of it in advance.³

A further question also is necessary. If an equitable right in the property does arise, is it available against the creditors or trustee

¹ Sec. 5 (1).

² Jones on Liens, § 1061 *et seq.*

³ *Ibid.*, § 1105 *et seq.*; *Re Peasley*, 137 Fed. Rep. 190.

in bankruptcy of the legal owner? Generally an equitable right in property prevails over any one but a purchaser for value without notice. It will appear later, however, that there may be reasons for a different rule in the case of future goods.

The most common dealing with future goods is by way of mortgage. Sometimes the mortgagor in terms contracts to mortgage the goods when acquired. More commonly, however, he purports to make a present conveyance by way of mortgage of the property. But, in the nature of the case, since a present transfer is impossible, this can mean nothing more than a promise to mortgage, while justice and the presumable intention of the parties require that it should mean as much as a promise.¹

It is necessary in a discussion of mortgages of future goods to distinguish sharply agreements to mortgage real estate or property which is to be, and subsequently is in fact, attached to realty, itself subject to mortgage. The rules of real property are not the same either at law or in equity as those governing personal property.

Agreements to mortgage or sell property of another sort must also be distinguished. The doctrine was laid down in the early case of *Grantham v. Hawley*,² that crops of specified land, the wool to be clipped in the future from specified sheep or the future young of specified animals, can be bargained and sold at law, because the seller has "potential possession." The effect of this doctrine, obviously based on a fiction, is not only that the legal title to the future property passes to the buyer as soon as the property comes into existence, but that this title is regarded as relating back to the time of the agreement. Carried to its full extent the doctrine would enable the owner of land or of animals to dispose of the crops or the young for any period of time in advance, and the disposition would be good against a *bona fide* purchaser of the land or of the parent animals as well as against similar purchasers of the crops and of the young animals. Though the doctrine seems to have been rarely invoked no limitation of it was ever suggested in England by the courts. In 1846 it was applied against an attaching creditor of crops who was deprived of the

¹ "An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer and make good that right or interest, which is made good here by way of agreement." Lord Hardwicke, *Wright v. Wright*, 1 Ves. 409, 411.

² Hob. 132 (1616).

property attached because it had been mortgaged by the occupant of the land before it came into existence.¹ Since this decision the doctrine does not seem to have been referred to in the English reports, and the Sale of Goods Act apparently discards it by providing in Section 5 (3) that "where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods." No exception is here made in favor of property which at common law was the subject of potential possession. Whether this was intentional or accidental is not wholly clear, since the draftsman of the Act, Judge Chalmers, makes no reference to the matter in his annotations of the Act. The abolition of the doctrine is wise. If the ordinary doctrines applicable to real and personal property do not afford as much protection as is desirable to transactions relating to crops or animals, the extent of the rights of a seller or mortgagee should be exactly defined and more closely limited than is done under the doctrine of potential possession. There is no reason why such transactions should enjoy peculiar protection to the possible prejudice of innocent creditors or purchasers.

In this country the situation is somewhat peculiar. The courts generally profess to follow the doctrine of *Grantham v. Hawley*, but when a case arises involving the distinction between an equitable right and a legal title, the case is generally dealt with as if the transfer of the future property created an equitable right only. The rules applied in different states differ considerably, and the varying laws governing recording and delivery have an important bearing upon the matter; but in few states in this country would *Grantham v. Hawley* be followed to its logical limits, that is, to the extent of holding that a transferee of non-existing property of this sort acquires a legal title good against all the world to the property when it comes into existence, perhaps many years after the agreement to transfer.

Though in this country the doctrine of potential possession is thus limited in its effects, it introduces an element of which account must be taken in cases within its scope. Such cases, therefore, are not generally here considered in dealing with the subject of equitable rights acquired by a contract to mortgage or sell future goods.

As to future goods which are not involved with the law of real

¹ *Petch v. Tutin*, 15 M. & W. 110.

estate or potential possession, the great case which settled the English law is *Holroyd v. Marshall*,¹ decided by the House of Lords in 1861. Though earlier English decisions had gone far in the same direction, and Judge Story in 1843,² relying on these earlier decisions, had anticipated in this country the result finally reached in England, it was not until the judgment in *Holroyd v. Marshall*¹ was rendered that it was clearly established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired, good against all but purchasers for value. Lord Campbell, sitting alone, had held that some "*novus actus interveniens*" was needed to make good the mortgagee's right,³ but the House of Lords reversed his decree and held that from the time when the property was acquired an equitable right attached to it which would prevail over any one except purchasers for value without notice. This doctrine has been frequently applied in more recent years in England.⁴

The grounds upon which the doctrine rests are not very clearly stated. It is most commonly regarded as an application of the principles of specific performance,⁵ and it is evident that what is actually done is to enforce the mortgagor's agreement that his future property shall be mortgaged or stand as security. The occasional denial that the case is one of specific performance is due partly to the fact that the mortgagor often uses no words of promise, but purports to transfer presently, and partly to the fact that the court does not order the execution of any mortgage. But the mortgagor promises impliedly, as has been previously shown, and the court does not order the execution of a mortgage only because it is unnecessary. It is essential that the mortgagee shall have actually advanced his money. If the contract is wholly executory, the doctrine of *Holroyd v. Marshall* is not applicable.⁶

¹ 10 H. L. Cas. 191.

² *Mitchell v. Winslow*, 2 Story (U. S. C. C.) 630.

³ 2 De G. F. & J. 596. Lord Campbell relied on Lord Bacon's maxim, *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praececedens quae sortiatur effectum interveniente novo actu*.

⁴ *Collyer v. Isaacs*, 19 Ch. D. 342; *Coombe v. Carter*, 36 Ch. D. 348; *Tailby v. Official Receiver*, 13 A. C. 523; *Cumberland Banking Co. v. Maryport Iron Co.*, [1892] 1 Ch. 415; *Governments Stock & Investment Co. v. Manila Ry. Co.*, [1897] A. C. 81; *In re Yorkshire Woolcombers' Assoc.*, [1903] 2 Ch. 284; *Edward Nelson & Co. v. Faber*, [1903] 2 K. B. 367.

⁵ See cases below *passim*.

⁶ *Tailby v. Official Receiver*, 13 A. C. 523, 543, 546.

Specific performance of an express contract to mortgage existing property granted against the promisor, though the cases are not numerous and the reasoning on which they are based is not always conclusive.¹ The result seems sound, however, because damages are not an adequate remedy for a promise to give security. It must always be problematical what the promisee's pecuniary injury is. The problem depends on the value of the security and the solvency of the debtor at the time when the debt is due. The factors are too indeterminate to make the legal remedy satisfactory.

The question of the effect of attempted dealings with future goods is generally regarded as dependent on rules of equity, and in most of the cases that arise no doubt the legal title to the property could not have passed. It should be observed, however, that it is perfectly easy to draw an agreement in such a way that legal title to future chattel property will pass. The ordinary doctrines of appropriation by one who has agreed to sell unspecified property can easily be made to cover the case. Any act of appropriation by the seller which has been assented to by the buyer in advance suffices to pass title.² The commonest class of cases illustrating this is where goods of a specified kind are ordered and are delivered to a carrier in accordance with the order.³ The same principle is applied though the goods remain wholly in the seller's control.⁴ Consequently, if an agreement between mortgagor and mortgagee provides, for instance, that the title to all goods put by the mortgagor upon his shelves or brought by him upon his premises shall be regarded as thereby appropriated to the mortgagee, on principle the title must pass to the mortgagee,⁵ except in so far as the effect of recording acts and the doctrines hereinafter considered may invalidate such a title.

The question in *Holroyd v. Marshall* related to all machinery thereafter placed in a certain mill; but later decisions applied the same principle to property included under broader terms, and in England it now seems established that, apart from the statutes hereafter

¹ Ames, *Cas. Eq. Jur.*, 61.

² The English Sale of Goods Act expressed this principle in Section 18, Rule 5.

³ Mechem on Sales, § 733 *et seq.*

⁴ *Pletts v. Beattie*, [1896] 1 Q. B. 519; *Tift v. Wight, etc., Co.*, 113 Ga. 681; *Weld v. Came*, 98 Mass. 152; *Mitchell v. Le Clair*, 165 Mass. 308; *Leggo v. Welland Vale Mfg. Co.*, [1901] 2 Ont. L. Rep. 45.

⁵ This is discussed in *Sawyer v. Long*, 86 Me. 541. See also *Lunn v. Thornton*, 1 C. B. 679; *Holly v. Brown*, 14 Conn. 255; *Dexter v. Curtis*, 91 Me. 505.

referred to, a mortgagor may promise to mortgage all property of any kind which he may thereafter acquire. Most of the cases which go to this extent are cases of corporate mortgages,¹ but the same result cannot be avoided if an individual mortgagor made the grant.² Indeed, in *Tailby v. The Official Receiver*,³ the mortgage included all property in any place where the mortgagor might carry on business, and all book debts owing to the mortgagor during the continuance of the mortgage. It is true that all the cases agree that the description of the property must be sufficiently exact to make the identification of the property certain when a right in it is claimed, but this requirement is not inconsistent with the enforcement of descriptions in the broadest and most inclusive language.

Furthermore, the convenience of the parties frequently requires that the mortgagee shall be allowed to sell or use as his own both the property which was originally subject to the mortgage and that which afterwards from time to time became subject to its terms. Sometimes the proceeds of such sales are required by the terms of the instrument to be used in the purchase of other property to take the place of that which has been sold, but frequently the mortgagor is not so restricted. He may covenant generally that he will keep a certain amount of property on hand subject to the mortgage, but in many cases he makes no such covenant. The mortgagee accepts such security as the property on hand within the terms of the mortgage may chance to afford when payment is required.

The doctrine of *Holroyd v. Marshall* has been applied not only to chattels, but to choses in action.⁴ The analogy between choses

¹ See case cited *infra*, p. 566 n. 7.

² This is so held in regard to existing property. In *In re Kelcey*, [1899] 2 Ch. 530, a charge as security for borrowed money on all the existing property of the borrower of every kind was sustained, and was held to give effectual security against the borrower's other creditors. Kekewich, J., said (p. 534), "It may be that it would be a great advantage that charges of this kind should not be allowed to take effect — that is to say, that there should be, for instance, a register of all charges on all property, and that fraud should be thereby rendered, so far as can be, impossible, and that even something short of what most people call fraud should be prevented, namely, confusion in ownership; but hitherto that has not been the policy of English law, except to a very small extent."

³ 13 A. C. 523.

⁴ *Tailby v. Official Receiver*, 13 A. C. 523; *Pullan v. Cincinnati, etc., R. R. Co.*, 5 Biss. (U. S. C. C.) 237; *Burdon, etc., Sugar Ref'g Co. v. Ferris Sugar Mfg. Co.*, 78 Fed. Rep. 417, 81 Fed. Rep. 663, 167 U. S. 127; *Re Marine Construction Co.*, 14 Am. B. Rep. 466; *Jessup v. Brown*, 11 Ia. 572; *Sandwich Mfg. Co. v. Robinson*, 83 Ia. 567; *Riddle*

in action and chattels is, however, not so perfect as seems to be assumed by the decisions. The legal title to existing chattels of the mortgagee can be presently transferred, but cannot be to chattels subsequently to be acquired without further action of the parties. This rule is what gives the court of equity its opportunity. The legal right even in existing choses in action, however, cannot be transferred. The practical effect of assignment of such property is produced whether the parties so state or not, by the authority or power of attorney which the owner of the claim gives to the assignee to collect it and keep the proceeds. It is impossible to suggest a reason why the same principles are not applicable to choses in action subsequently to be acquired. One may make another his attorney to collect a debt which is coming into existence tomorrow, as readily as to collect one already in existence. There is, therefore, no reason why equity should have treated an assignment of future debts in any different way from an assignment of present debts. The power given the assignee expressly or impliedly should be sufficient to enable him to enforce his rights at law either in the name of the assignor or, under modern statutes, in his own name.

There seems no reason to question seriously the propriety of the equitable relief which the English courts give against the person who contracts to mortgage property which he may thereafter acquire. The only possible question is whether public policy should set any limits to the power of a man to bargain away not only all that he has but all that he ever may have. On ordinary principles a natural consequence of the right against the mortgagor is a similar right against every one except a *bona fide* purchaser for value without notice, and *Holroyd v. Marshall*, in fact, decides

v. Dow, 98 Ia. 7; *Edwards v. Peterson*, 80 Me. 366; *Schubert v. Herzberg*, 65 Mo. App. 578; *Williamson v. New Jersey Southern, etc.*, R. R., 26 N. J. Eq. 398; *Clay v. East Tenn. R. R. Co.*, 6 Heisk. (Tenn.) 421. See also 70 L. R. A. 338 n; but a mortgage of future earnings is generally held not good against creditors until the mortgagee takes possession. *Galveston Railroad v. Cowdrey*, 11 Wall. (U. S.) 459; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Amer. Bridge Co. v. Heidelbach*, 94 U. S. 798; *Sage v. Memphis, etc., R. R. Co.*, 125 U. S. 361; *U. S. Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, 307; *M. V. & W. Ry. v. U. S. Express Co.*, 81 Ill. 534; *Ellis v. Boston, etc., R. R. Co.*, 124 Mass. 155; *De Graff v. Thompson*, 24 Minn. 452; *N. Y. Security Co. v. Saratoga Gas Co.*, 159 N. Y. 137. In some jurisdictions also the right to assign a future claim is denied when the claim is not only not due, but there is no existing contract from which the claim is expected to arise. *Lightbody v. Smith*, 125 Mass. 51; *Eagan v. Luby*, 133 Mass. 543; *Lehigh Co. v. Woodring*, 116 Pa. 513; *O'Neil v. Kerr Co.*, 124 Wis. 234.

that such contracts give a lien upon the property to which they relate enforceable against creditors, and it is the effect of the doctrine upon creditors and trustees in bankruptcy that makes the subject one of more than occasional importance.

It is evident that general creditors are likely to be defrauded by the almost unlimited power that the right to make effective mortgages of future property gives to a debtor, who may in this way secure particular creditors while himself retaining the possession of his property, and not only all the apparent incidents of ownership, but all the actual incidents, with the single exception that the mortgagee after the maturity of the mortgage may at any time seize the property then remaining. The difficulty may be met by legislation dealing with the specific question, and this course has been adopted in England, but not generally in this country.

There are here, however, several doctrines which may be infringed by the allowance of these equitable liens:

1. Recording acts require chattel mortgages to be recorded or the possession of the chattels to be transferred.
2. Chattel property which is transferred but of which possession is retained by the seller, in many jurisdictions even apart from the provisions of recording acts, may be seized by the seller's creditors.
3. It is often held to make a mortgage fraudulent, if the mortgagor is allowed by the terms of the mortgage or by the agreement of the parties to withdraw from the mortgage the property covered by it, at his pleasure, and sell the property as his own.
4. The Bankruptcy Act forbids preferences, and the policy of the Act is to secure equality of distribution among the bankrupt's creditors.

On all these subjects the law of England differs considerably from that in force in most states of this country, and an examination of our law in these particulars is necessary in order to reach a proper conclusion as to the propriety of our courts following the precedent of *Holroyd v. Marshall*.

The English legislation specifically dealing with the matter is contained in the Bills of Sale Act of 1878.¹ Section 4 of that Act requires as a condition of the validity of a bill of sale, except

¹ 45 & 46 Vict. c. 43. Bill of sale is used in England as the name not only of an instrument transferring title absolutely to the grantee, but also and more commonly of an instrument transferring title conditionally as security only, which would be called in America a chattel mortgage.

as against the grantor, a schedule to be attached containing an inventory of the chattels granted. The statute then proceeds:

"Section 5. Save as hereinafter mentioned a bill of sale shall be void except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

"Section 6. Nothing herein contained in the foregoing sections shall render a bill of sale void in respect of any of the following things: (that is to say)

"(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

"(2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

Section 9 provides that a bill of sale not in accordance with the form provided in the act "shall be void." This form is appropriate to the transfer of existing property only. Accordingly the House of Lords has held¹ that a bill of sale which attempts to include besides specifically described existing property, future goods under a general description, is void, not only as to the future property but as to the existing property, and even between the parties.

This statute, therefore, not only makes ineffectual attempts to transfer future goods by writing, either absolutely or as security, but imposes a heavy penalty on the attempt to do so by general description by invalidating any transfer of existing property contained in the same instrument. In several particulars, however, the statute does not cover the whole ground of future transfers.

1. The express exception of the statute in section 6 permits transfer of two kinds of future goods.

2. There is nothing in the English law requiring an agreement to transfer chattel property to be in writing, and if not in writing the Bills of Sale Acts are not applicable.²

3. The operation of these acts, including that under special consideration, is confined to "personal chattels" as therein defined.³ This term includes "goods, furniture, and other articles

¹ *Thomas v. Kelly*, 13 A. C. 506.

² 2 *Encyc. of the Laws of England* 129.

³ 41 & 42 Vict. c. 31, sec. 4.

capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." Shares of stock and choses in action of all kinds are expressly excluded. A mortgage of all book debts which may be due to the mortgagor at any time in the future is, therefore, still valid.¹

4. The Bills of Sale Acts exempt from their operation² transfers of chattels by marriage settlement, by transfer in the ordinary course of business of any trade, by bills of sale of goods in foreign ports or at sea, bills of lading, India warrants, warehouse receipts, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing the possessor of the document to transfer or receive goods thereby represented. This opens a wide door.³

5. Mortgages or charges made by incorporated companies are not within the Bills of Sale Acts. This is partly due to an express statutory provision⁴ and partly because special provision is made in the Companies Acts for the registration of such mortgages and charges.⁵ Accordingly mortgages in the most general terms, usually in the form of debentures, are in use in England and are upheld.⁶ A common form provides for a charge in favor of the debenture holder upon all property of every kind which the company then has or may thereafter acquire, but the company may use and deal with the property as its own to the fullest extent until default or insolvency or cessation of business. This is called a floating charge, and it will be seen that it amounts practically to nothing more than an agreement that in case the

¹ See *Tailby v. Official Receiver*, 13 A. C. 523, where, however, the mortgage in litigation had been made prior to the passage of 41 & 42 Vict. c. 31.

² 41 & 42 Vict. c. 31, sec. 4.

³ In *Re Hamilton*, [1905] 2 K. B. 772, unrecorded "letters of lien" upon certain goods in the possession of the debtor were held to give the creditor a valid lien when the debtor became bankrupt. The letters were simply undertakings by the debtor on printed forms to hold certain goods until shipment subject to a lien in favor of the creditor, and upon shipment to transfer the bills of lading to the creditor. The Court of Appeal held that the letters of lien were "documents used in the ordinary course of business as proof of the possession or control of goods," which the Bills of Sale Acts except from the requirement of record.

⁴ 45 & 46 Vict. c. 43, sec. 17.

⁵ *Re Standard Mfg. Co.*, [1891] 1 Ch. 627.

⁶ *Governments Stock and Investment Co. v. Manila Ry. Co.*, [1897] A. C. 81; *Re H. H. Vivian and Co.*, [1900] 2 Ch. 654; *Re Borax Co.*, [1901] 1 Ch. 326; *Edward Nelson and Co. v. Faber*, [1903] 2 K. B. 367; *Re Yorkshire Woolcombers' Assoc.*, [1903] 2 Ch. 284. See further 4 *Encyc. of Laws of England* 147.

debtor has not sufficient assets to pay all his creditors, the debenture holders shall be preferred.

If the English precedents should be followed in this country, there would be no qualification of the power to mortgage future goods in most jurisdictions, since there are few statutes directly relating to such mortgages. There are, however, as has been indicated, doctrines based partly on statutes and partly on the common law which have an important bearing on the matter.

1. As to recording acts it should be noticed in the first place that such laws relating to chattels are, from the nature of the case, far less satisfactory than is a similar system applied to real estate. Transactions in real estate are comparatively infrequent, and generally involve a considerable sum of money. It has always been customary to make some examination of the title of a seller or mortgagor of such property, and the time and money thereby expended are not a serious burden on the business of a community. On the other hand, at least in the case of ordinary sales of chattels, it never has been customary, and never will be, because of the expense and delay involved, to search records for the seller's title. Moreover, while it is always easy to determine with certainty where every existing encumbrance of land must be recorded, in the case of chattel property such certainty is never possible, since both the property and its owner may have moved from place to place. A sale in Boston may be invalidated by a mortgage recorded in another city. Doubtless chattel mortgages with the mortgagor in possession are necessary, but the evils with which they are necessarily accompanied are such as to give reason for hesitation in extending the right to make such mortgages beyond the requirements of the community.

The English Bills of Sale Acts,¹ as has been seen, unlike our recording acts, do not require every chattel mortgage to be recorded. If the transaction is written it must generally be recorded,² but it need not be written. As it is not a governing principle in the English legislation, as it is in ours, that every chattel mortgage must be recorded, it is natural that in England it should not be considered a fatal objection to a mortgage of future chattel property that effective record is difficult or impossible. In this country

¹ Those now in force are 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

² 2 Encyc. of the Laws of England 129.

such an objection, if warranted by the facts, is more serious. That effective record cannot be made under the statutes in force in many states in this country is clear.¹ The residence of the mortgagor is the place most commonly fixed in the statutes as the place of record. Under such a statute, if a debtor mortgaged future property the mortgage would be recorded where he lived at the time the instrument was executed. When the property came into his possession he might be living in another place. Indeed, to be sure that property just acquired by his debtor did not immediately become subject to an old mortgage, a creditor would have to search the records in every place where the debtor had ever lived. This difficulty is met by statutes in some states requiring a new record when the mortgagor changes his residence. The remedy is not without its evils, however, for a mortgagee does not always know when a mortgagor changes his residence, and for the law to invalidate the lien of the mortgage, if the mortgagee fails to record promptly at the mortgagor's new residence, frequently acts as a premium offered to the mortgagor for stealing secretly away.

Other recording acts make record necessary in the place where the property is situated at the time of the conveyance. This requirement is sometimes exclusive and sometimes additional to the requirement of record at the mortgagor's residence. It is hard to see how a mortgagee of future property can comply with such a statute. Such property is not usually identified at the time the mortgage is made. Its *situs* and very existence are undetermined.

Some statutes require that chattel mortgages, in order to remain in force, must be refiled within a specified period, generally fixed at one year. This requirement more nearly meets the difficulties of the situation than any other. It is troublesome to the creditor, but by doing as the statute directs he can be sure of retaining his hold upon the property, and though the difficulties arising from the debtor's change of residence or the removal of the property are not wholly avoided, they are reduced within as narrow limits as seems possible.

There is one particular difficulty in the way of effective record inherent in mortgages of future property. A creditor will naturally assume that a lien upon specific property does not precede the acquisition of the property, and will not search records prior

¹ The American Statutes are collected in Jones, *Chattel Mortgages*, § 190 *et seq.*

to a time when he knew the property was acquired, yet the mortgage may antedate this time by any number of years.

If our recording acts are applicable, the result would naturally be that the mortgagee of future chattel property acquires a title superior not only to creditors of the mortgagor, but to purchasers for value from him, except in so far as such transfers may have been expressly or impliedly authorized by the mortgagee himself; for the record, if good for anything, operates as notice to all the world, and thereby makes the equitable right of the mortgagee as effective as a legal right. If, however, a mortgage is actually or constructively fraudulent, record would impart no additional validity to it.

2. The statutory and common law rules in regard to the necessity of delivery by the buyer, and forbidding retention of possession by the seller are based on the same general policy of the law that lies behind the legislation requiring chattel mortgages to be recorded. The possessor of chattel property is likely to be thought the owner, and to obtain credit on the faith of it. The law therefore limits, so far as may be, the dissociation of title and possession. If this policy is carried to its logical extreme the rule of the French civil code, "*en fait de meubles possession vaut titre*,"¹ is the result. Even in France, however, this rule is not literally enforced,² and our law, of course, is very far from treating any possessor as capable of giving a good title. Nevertheless the tendency of the law is distinctly in the direction of giving to one who has been entrusted with possession the capacity of an owner,³ and in favor of this tendency it is to be observed both that convenience of trade, which is always subserved rather by the certainty of the newly acquired title than by the protection of an anterior right, is promoted thereby, and also that it is fairer in a conflict between two innocent persons to prefer one who relied upon the ownership of the possessor of goods rather than one who voluntarily entrusted

¹ Art. 2279.

² By exception in the article itself, one who has lost a chattel, or from whom it has been stolen, may reclaim it from any one for three years. As to the construction of the article see the annotated code of Sirey et Gilbert.

³ A striking proof of this may be found in the English Factors' Act of 1889. Section 8 provides that a seller who has retained possession can make an effective sale or pledge of goods. Section 9 provides that a buyer allowed to take possession, though not having title, has the same power. Both provisions sharply changed the law of England. In this country without the aid of statutes the same result has been reached in many states on both these questions.

the possessor with the property. In this country the law is in a very confused state as to the extent to which delivery and continued possession are necessary to give to a purchaser a right indefeasible by creditors of the seller or a later purchaser from him; but it is probably safe to say that in a majority of states even a purchaser of the legal title of existing property will lose his rights if the goods are attached while still undelivered in the hands of the seller, or if the seller wrongfully makes another sale of the goods and delivers them to the subsequent purchaser.¹ In some states two separate doctrines exist, though one partially overlaps the other. One doctrine is that delivery, though not necessary to the transfer of title between seller and buyer, is essential to the validity of the title as against third persons; the other is that retention of possession by the seller is presumed to be a fraud upon the seller's creditors, and under the statute of 13 Eliz. c. 5 the transfer of title may be treated as a fraudulent conveyance and therefore void. The first doctrine protects both subsequent purchasers and creditors; the second, creditors only. The first is an absolute rule applicable without regard to circumstances making delivery difficult or impossible; the second is generally in this country as in England, simply a rule of presumption, and evidence showing the *bona fides* of the parties or the impossibility of transferring possession at once is admissible. In other states these two doctrines seem to have been consolidated, and statutes have been passed making a change of possession essential to the validity of a transfer.

3. Even though a mortgage of future goods with the mortgagor in possession does not conflict with the principles just considered, there are often provisions in such mortgages which are open to a narrower objection. Frequently the mortgagor is allowed to sell or otherwise dispose of the property which is the subject of the mortgage without any obligation to account for the proceeds or use them in buying other goods to be substituted for those sold. This is especially the case in mortgages of the stock in trade of a business. In England a mortgage with such a right to sell is said to give a "floating charge." As has been seen,² the validity of this is there recognized apart from statutory prohibition. In most jurisdictions of this country, however, a power given to the mortgagor to withdraw at will property from

¹ See Williston's *Cas. Sales* (2d ed.) 384, n.

² See *supra*, p. 566.

the mortgage is a step beyond the limits imposed by the law of fraudulent conveyances, and such mortgages are invalid irrespective of whether a mortgage of future goods is generally effectual.¹ In some jurisdictions, however, such power is at most evidence of fraud.²

4. Since 1898 there has been a national bankruptcy law. Before that time, except for brief periods when former federal laws on the same subject were in force, the law of bankruptcy was settled by each state according to its individual taste. In a very few states there was legislation amounting in effect to a bankruptcy law, but this was exceptional.³ There are two vital objects of bankruptcy legislation, one of which concerns the debtor, the other

¹ *Robinson v. Elliott*, 22 Wall. (U. S.) 513; *Re Marine Construction Co.*, 135 Fed. Rep. 921; *Christian & Craft Co. v. Michael*, 121 Ala. 84; *Lund v. Fletcher*, 39 Ark. 325; *Martin v. Ogden*, 41 Ark. 186; *Gauss v. Doyle*, 46 Ark. 122 (*cf.* *Morton v. Williamson*, 72 Ark. 390); *Hall v. Johnson*, 21 Col. 414; *Rogers v. Munterlyn*, 36 Fla. 591; *Lewiston Nat. Bank v. Martin*, 2 Idaho 700; *Greenebaum v. Wheeler*, 90 Ill. 296; *Mobley v. Letts*, 61 Ind. 11; *Davenport v. Foulke*, 68 Ind. 382 (but the law is now otherwise in Indiana. *Fletcher v. Martin*, 126 Ind. 55, 57); *Rathbun v. Berry*, 49 Kan. 735; *Humphrey v. Mayfield*, 63 Kan. 208 (*cf.* *Atchison Saddlery Co. v. Gray*, 63 Kan. 79); *Ross v. Wilson*, 7 Bush (Ky.) 29; *Horton v. Williams*, 21 Minn. 187; *Pabst Brewing Co. v. Butchart*, 67 Minn. 191; *Donohue v. Campbell*, 81 Minn. 107; *Joseph v. Levi*, 58 Miss. 843; *Johnston v. Tuttle*, 65 Miss. 492; *Hazlehurst Bank v. Goodbar*, 73 Miss. 566; *Barton v. Sitlington*, 128 Mo. 164; *State v. O'Neill*, 151 Mo. 67, 87; *Rochelleau v. Boyle*, 11 Mont. 451; *Buckstaff Mfg. Co. v. Snyder*, 54 Neb. 538; *Lutz v. Kinney*, 24 Neb. 38; *Locke v. New England Brick Co.*, 63 Atl. Rep. 178 (N. H.); *Speigelberg v. Hersch*, 3 N. Mex. 185; *Hangen v. Hachemeister*, 114 N. Y. 566; *Mandeville v. Avery*, 124 N. Y. 376; *Zartman v. First Nat. Bank*, 96 N. Y. Supp. 633 (App. Div. Sup. Ct.); *Bergman v. Jones*, 10 N. Dak. 520; *Freeman v. Rawson*, 5 Oh. St. 1; *Enck v. Gerding*, 67 Oh. St. 245; *Will T. Little Co. v. Burnham*, 5 Okla. 283; *Aiken v. Pascall*, 19 Ore. 493; *Fisher v. Kelly*, 30 Ore. 1; *Tennessee Bank v. Ebbert*, 9 Heisk. (Tenn.) 153; *Rome Bank v. Haseltine*, 15 Lea (Tenn.) 216; *Moore v. Wood*, 61 S. W. Rep. 1063 (Tenn. Ch.); *Wilber v. Kray*, 73 Tex. 533; *McKibbin v. Brigham*, 18 Utah, 78; *Hughes v. Epling*, 93 Va. 424; *Garden v. Bodwing*, 9 W. Va. 121 (*cf.* *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487); *Blakeslee v. Rossman*, 43 Wis. 116; *Durr v. Wildish*, 108 Wis. 401.

² *Etheridge v. Sperry*, 139 U. S. 266; *Allen v. Windham Mfg. Co.*, 87 Fed. Rep. 786; *Re Hull*, 115 Fed. Rep. 858; *Egan Bank v. Rice*, 119 Fed. Rep. 107; *Re Ball*, 123 Fed. Rep. 164; *Wardlaw v. Mayor*, 77 Ga. 620; *Phillips v. McChesney*, 8 Hawaii 289; *Clark v. Hyman*, 55 Ia. 14; *Meyer v. Evans*, 66 Ia. 179; *Blanchard v. Cooke*, 144 Mass. 207, 226; *Leland v. Collyer*, 34 Mich. 418; *Louden v. Vinton*, 108 Mich. 313; *Lister v. Simpson*, 38 N. J. Eq. 438; *Kreth v. Rogers*, 101 N. C. 263; *Williams v. Winsor*, 12 R. I. 9; *Marshall v. Crawford*, 45 S. C. 189; *Black Hills Co. v. Gardiner*, 5 S. Dak. 246; *Custer City Bank v. Calkins*, 12 S. Dak. 411; *Bartlett v. Walker*, 65 Vt. 594; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487; *McCord v. Albany County Bank*, 7 Wyo. 9.

³ The legislation in force in the various states is classified in Williston's *Cas. Bankruptcy*, 6.

his creditors. The first is the discharge of the debtor; the second, the equal distribution of his property among his creditors. One of the means to effect the latter object is the portion of the law relating to preferences. Preference of one creditor over another by an insolvent debtor was not in violation of the common law,¹ and prior to 1898 was, therefore, not in violation of the law of most of the United States. Though now forbidden to the debtor and under certain circumstances recoverable from the creditor, both here and in England, the definition of what constitutes a preference differs strikingly in the countries. An essential requisite in England is that the debtor's dominant motive in making the payment in question should be a desire to prefer the creditor.² Therefore, if the payment was made because of pressure on the part of the creditor,³ or in order to escape a criminal prosecution,⁴ or to protect a surety from liability,⁵ or to avoid the bar of the statute of limitations,⁶ or to fulfil a supposed legal duty,⁷ or to keep in good credit,⁸ it is not a preference. So a valid security given in exchange for one intended to be valid, but not so in fact, is not a preference in England.⁹ In this country, all such payments are preferences. The only question to be asked is, did the debtor pay an antecedent debt? Why he paid it is immaterial.¹⁰ There can be little doubt that the American rule is the better, for it more fully carries out the general purpose of securing equality of distribution, and there is no natural equity which should protect payments which do in fact prefer and which were known to prefer, because the debtor was serving some end of his own in making the payment rather than merely intending to benefit the creditor. Moreover, the English rule is necessarily difficult to apply. It may some-

¹ 14 Am. & Eng. Encyc. of Law (2d ed.) 226.

² *Ex parte* Griffith, 23 Ch. D. 69; *Re* Eaton, [1897] 2 Q. B. 16.

³ *Van Casteel v. Booker*, 2 Exch. Rep. 691.

⁴ *Ex parte* Taylor, 18 Q. B. D. 295; *Sharp v. Jackson*, [1899] A. C. 419.

⁵ *Re* Mills, 58 L. T. N. S. 871.

⁶ *Re* Lane, 23 Q. B. D. 74.

⁷ *Re* Fletcher, 9 Mor. 8; *Re* Vingoe, 1 Man. 416.

⁸ *Re* Clay, 3 Man. 31.

⁹ *Re* Tweedale, [1892] 2 Q. B. 216.

¹⁰ Loveland on Bankruptcy, § 195. It is true that "intent to prefer" is necessary in order that the preference shall constitute an act of bankruptcy, and the creditor cannot be deprived of his preference unless he had reasonable cause to believe that such an intent existed; but it is rightly held that if an insolvent debtor, knowing the existing situation, pays a debt he must be presumed to intend the natural consequences of his act.

times be necessary for a court to try the question what was a man's dominant motive, but in the nature of the case the question is so doubtful that litigation is invited, and the result of the litigation will often depend on chance.

The bearing is plain of the doctrines which have just been considered upon the propriety of enforcing equitable liens on future property against creditors. If mortgages of existing goods are binding only between the parties unless recorded, the policy of the law must certainly require the same formality in the case of mortgages of future goods. Whether the difficulties of satisfactory record are so great as to make it undesirable to attempt to adjust a recording system to meet them is a question upon which opinions may differ. The terms of many recording acts as they at present exist seem inapplicable to mortgages of future goods.¹ In a jurisdiction of this sort the declared policy of the legislature to make record of mortgages of existing goods a condition of their validity would seem to make it improper for a court of equity to sustain a mortgage of future goods where there can be neither record nor change of possession. Where such mortgages are sustained record is generally required.²

The bankruptcy law may have a bearing on the subject in more ways than one. If a mortgagor of future goods becomes insolvent before the goods or all of them have become identified, the subsequent identification of the goods by the agency of the mortgagor, amounting as it does to a transfer of property, must be a preference and an act of bankruptcy on his part, and certainly if the mortgagee had reasonable cause to believe that the mortgagor was insolvent he could not retain the fruits of the preference. Thus, if one who has mortgaged a fluctuating stock of goods adds new goods to the stock from time to time, these new goods, according to the doctrine of *Holroyd v. Marshall*, are subjected to the lien of the mortgage. But if the mortgagor was insolvent at the time when these additions were made, he is guilty of a preference in making them, for obviously there was no lien of any kind on these goods

¹ *Jones v. Richardson*, 10 Met. (Mass.) 481; *Griffith v. Douglass*, 73 Me. 532.

² *Gregg v. Sanford*, 24 Ill. 17; *Hudson v. McKale*, 107 Mich. 22; *Hoyle v. Plattsburgh*, etc., R. R., 54 N. Y. 322. But in *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626, 629, it was held that a promise by a tenant that future goods should stand as security for future rent was valid without record. It is submitted that this decision is contrary to public policy, whether it is a correct interpretation of the Rhode Island statute or not.

until they were added to the stock. It is an act of bankruptcy for him to carry out a contract by transferring property in accordance with his contracts. If equity gives a property right under these circumstances, the debtor must in that case also be committing an act of bankruptcy. It does not seem right for equity thus to create a property right by treating as done what has been contracted to be done, when the debtor is forbidden by law to do it at that time.

Another limitation which our law of bankruptcy may impose upon the right to transfer future goods concerns the breadth of the description of the goods. The English cases have upheld mortgages which attempted to transfer little if anything less than all the property the mortgagor might have at any time while the debt should be unpaid. But in England, under their law of preference, a general promise of security given at the time a debt is contracted may be executed after the debtor has become insolvent;¹ while in this country, Judge John Lowell expressed the law when he said: "I have been accustomed to say that such an agreement merely amounts to an agreement to give a preference if one should become necessary."² How far different from this is an agreement that a creditor shall have a mortgage on all the future goods of the debtor, when the agreement is coupled with permission, express or implied, that any future goods which the debtor acquires he may deal with and dispose of as his own. Even aside from the bankruptcy law, as has been seen, such mortgages are often held to be fraudulent conveyances,³ but when preferences are forbidden the objectionable character of the agreement is more apparent. The entire purpose of the agreement, it is obvious, is to allow the mortgagor unfettered control of his property unless he gets into financial difficulty. In that event the mortgagee will swoop down upon whatever property happens to be in the mortgagor's hands and claim a lien upon it.

¹ Baldwin, *Bankruptcy*, 9th. ed., 125; *supra*, p. 572.

² *Ex parte Ames*, 1 Low. (U. S. Dist. Ct.) 561. In accord are *Bank of Leavenworth v. Hunt*, 11 Wall. (U. S.) 391; *Rundle v. Murgatroyd*, 4 Dall. (U. S.) 304; *Re Connor*, 1 Low. (U. S. Dist. Ct.) 532; *Brett v. Carter*, 2 Low. (U. S. Dist. Ct.) 458; *Barrow v. Morris*, 14 B. R. 371; *Burdick v. Jackson*, 15 B. R. 318; *Lloyd v. Strobbridge*, 16 B. R. 197; *Re Ronk*, 111 Fed. Rep. 154; *Holmes v. Winchester*, 135 Mass. 299; *Sebring v. Wellington*, 63 N. Y. App. Div. 498. So a chattel mortgage of future property given when the mortgagor was insolvent and within four months of bankruptcy is a preference though the mortgage was given to comply with an oral agreement made six months before. *Re Dismal Swamp Contracting Co.*, 14 Am. B. Rep. 175.

³ *Supra*, p. 570.

What is this but an agreement to give a preference if one shall become necessary? The conditions already referred to that are found in the debentures of English companies, as for example that the mortgagor may deal with the property as its own until there has been default in the payment of the interest for three months or until an order or resolution for winding up, plainly show the intent and purpose of the agreement. In this country this intent and purpose clearly violate the law forbidding preferences, and are therefore illegal.

For some or all of the reasons here given mortgages of future chattel property of which the mortgagee is in possession are in many states held invalid against an attachment or levy by creditors.¹

Mortgages of future property by corporations seem to have been treated in this country with somewhat more respect than similar mortgages made by individuals,² though the sharp distinction

¹ *Christian & Craft Co. v. Michael*, 121 Ala. 84; *Walker v. Vaughn*, 33 Conn. 577; *American Surety Co. v. Worcester Cycle Co.*, 100 Fed. Rep. 40 (Conn.); *Gregg v. Sanford*, 24 Ill. 17; *Pinkstaff v. Cochran*, 58 Ill. App. 72; *Fisher v. Syfers*, 109 Ind. 514; *Long v. Hines*, 40 Kan. 216; *T. B. Townsend Co. v. Allen*, 62 Kan. 311; *Ross v. Wilson*, 7 Bush (Ky.) 29; *Loth v. Carty*, 85 Ky. 591; *Manly v. Bitzer*, 91 Ky. 596, 598; *Griffith v. Douglass*, 73 Me. 532 (*cf.* *Sawyer v. Long*, 86 Me. 541); *Moody v. Wright*, 13 Met. (Mass.) 17; *Cooke v. Blanchard*, 144 Mass. 207; *Moors v. Reading*, 167 Mass. 322; *Tatman v. Humphrey*, 184 Mass. 361; *Brown v. Wiggin*, 16 N. H. 312; *Gardner v. McEwen*, 19 N. Y. 123; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Re Marine Construction Co.*, 14 Am. B. Rep. 466 (N. Y.); *Zartman v. First Nat. Bank*, 96 N. Y. Supp. 633 (Sup. Ct., App. Div.) (*cf.* *Re Sentenne & Green Co.*, 120 Fed. Rep. 436); *Francisco v. Ryan*, 54 Oh. St. 307. See also *Hitchcock v. Hassett*, 71 Cal. 331; *Rowell v. Claggett*, 69 N. H. 201; *Girard Trust Co. v. Mellor*, 156 Pa. 579, 590 (*cf.* *Collins's App.*, 107 Pa. 590), and cases cited *supra*, p. 571, n. 1; also *Civ. Code, La.*, § 3308.

In other states, however, the contrary is held. *Hughes v. Wheeler*, 66 Ia. 641 (good against a purchaser from the mortgagor); *Riddle v. Dow*, 98 Ia. 7; *Hogan v. Atlantic Elevator Co.*, 66 Minn. 344 (good against a purchaser); *Everman v. Robb*, 52 Miss. 653; *Smithurst v. Edmunds*, 1 McCart (N. J.) 418; *Cumberland Bank v. Bridgeton*, 57 N. J. Eq. 231, 240; *Stoll v. Sibson*, 65 N. J. Eq. 552; *Parker v. Jacobs*, 14 S. C. 112; *Hirshkind v. Israel*, 18 S. C. 157 (good against a purchaser); *First Bank v. Turnbull*, 32 Gratt. (Va.) 695; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487. See also *Sillers v. Lester*, 48 Miss. 513. Mortgages of future property are expressly authorized by statute in Cal. C. C. § 2883; Idaho, C. C. § 2791; New Hampshire, Laws of 1901, c. 66; North Dakota, C. C. § 4705; Oklahoma, Statutes of 1893, § 3188; Wyoming, Rev. Stat. (1899) § 2805. In Maine and Michigan the mortgage is good against creditors if the future property is taken in substitution for existing property. *Sawyer v. Long*, 86 Me. 541; *Eddy v. McCall*, 71 Mich. 101; *Ferguson v. Wilson*, 122 Mich. 97. So in Georgia by statute, Code, Sec. 1954; see *infra*, p. 581, n. 5.

² Corporate mortgages of future property were held good against creditors in *Pennock v. Coe*, 23 How. (U. S.) 117; *Shaw v. Bill*, 95 U. S. 10; *Pullan v. Cincinnati*,

which has been drawn in England by statutes¹ does not exist. There are several grounds upon which a difference in degree, if not in kind, may be based. Corporations of some kinds, such as railroad corporations, mortgage all their property so habitually that those who deal with such corporations are not deceived by the possession of the corporation. Further, only corporations "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" are subject to involuntary bankruptcy. Railroad corporations and others not within the enumerated classes are, therefore, at liberty to prefer their creditors. Some decisions have also relied on the fact that the corporation in question was authorized to mortgage its property. This fact can, however, hardly warrant the conclusion that because a desirable mortgage cannot be made without mortgaging future property, the legislature must be held to have authorized the effective inclusion of such property.

It had been intimated in England, before the decision of *Holroyd v. Marshall*, that an agreement to mortgage future goods, coupled with an authority to take possession of the goods, would give the mortgagee a legal right to the mortgaged goods as soon as he took possession.² The correctness of this is evident, and under the English law of preference it can make no difference that the mortgagor was insolvent at the time that the mortgagee seized the goods. Not unless the mortgagor, with the dominant motive of giving the creditor an advantage, voluntarily delivered possession of the goods to the mortgagor could the transaction amount to a preference, even though it were admitted to the fullest extent that the original agreement gave no equitable interest in the property. Likewise in most states in this country, except while national bankruptcy acts have been in force, preferences have not been in any way forbidden. In such states, therefore, the same result is a matter of course.³ But where, as in Massachusetts, for more than

etc., R. R., 5 Biss. (U. S. C. C.) 237; *Scott v. Clinton*, etc., R. R. Co., 6 Biss. (U. S. C. C.) 529; *Hodder v. Kentucky*, etc., R. R. Co., 7 Fed. Rep. 799; *Manhattan Trust Co. v. Sioux City*, etc., R. R. Co., 68 Fed. Rep. 72; *Jessup v. Bridge*, 11 Ia. 572; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Bell v. Chicago*, etc., R. R., 34 La. Ann. 785; *Morrill v. Noyes*, 56 Me. 458; *Butler v. Rahm*, 46 Md. 541; *Williamson v. New Jersey*, etc., R. R., 26 N. J. Eq. 398; *Phila. W. & B. R. R. Co. v. Woelpper*, 64 Pa. 366. See also *Howard v. Iron & Land Co.*, 62 Minn. 298. But see *contra*, *Locke v. New England Brick Co.*, 63 Atl. Rep. 178 (N. H.)

¹ See *supra*, p. 566.

² *Lunn v. Thornton*, 1 C. B. 679.

³ *Am. Surety Co. v. Worcester Cycle Co.*, 100 Fed. Rep. 40; *Re Antigo Screen*

fifty years a state insolvency law has forbidden preferences, or when, as has been the case since 1898, a national bankruptcy law prevails throughout the country, it is by no means so clear that seizure by the creditor when the debtor is insolvent would not be a preference, and that if the insolvency is known to the creditor and bankruptcy supervened within four months, the transaction would not be voidable.¹ In the early Massachusetts case of *Moody v. Wright*² the court, though deciding that the original agreement gave no equitable lien, intimated that a seizure by the creditor at any time before actual proceedings under the insolvency law would be valid. The court was influenced by the English case of *Mogg v. Baker*³ on which it relied without observing the distinction, then not so well settled as now between the English and American law of preferences. In *Chase v. Denny*,⁴ the Massachusetts court, following the earlier *dictum*, squarely held that the "taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor," gave the mortgagee a valid lien. The court said that it was "not the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract." The court here seems to have lost sight of the distinction between a property right and a contract right.

Door Co., 123 Fed. Rep. 249 (C. E. A.); *Columbus Iron Works v. Renfro*, 71 Ala. 577; *Walker v. Vaughn*, 33 Conn. 577; *Gregg v. Sanford*, 24 Ill. 17; *Pinkstaff v. Cochran*, 58 Ill. App. 72; *Fisher v. Syfers*, 109 Ind. 514; *Burford v. First Nat. Bank*, 30 Ind. App. 384; *Cameron v. Marvin*, 26 Kan. 612; *Leland v. Collver*, 34 Mich. 418; *Barton v. Sitlington*, 128 Mo. 164; *State v. O'Neill*, 151 Mo. 67; *McCaffrey v. Woodin*, 65 N. Y. 459; *Francisco v. Ryan*, 54 Oh. St. 307; *Cook v. Corthell*, 11 R. I. 482; *Moore v. Byrum*, 10 S. C. 452; *Peabody v. Landon*, 61 Vt. 318; *Thompson v. Fairbanks*, 75 Vt. 361, 196 U. S. 516; *Merchants' Bank v. Lovejoy*, 84 Wis. 601. Cf. *Alabama Bank v. Barnes*, 82 Ala. 607; *Bank of Eutaw v. Alabama Bank*, 87 Ala. 163.

¹ In *Humphrey v. Tatman*, 198 U. S. 91, 92, Mr. Justice Holmes, speaking for the court, said: "We assume also, without deciding, that if, as against the trustee, the mortgage is to be regarded as first having come into being when the mortgagee took possession, it would be void. In the latter view the anomalous case would be presented of a mortgage of all a man's stock in trade to secure a past debt, executed to one who had reasonable cause to believe that the mortgagor was insolvent and that he was receiving a preference, but executed without intent to prefer on the part of the mortgagor. There would be a preference within the definition in § 60 a, and the mortgagee would know it, but he could not be said in a strict sense to have reasonable cause to believe that it was intended to give a preference. We assume, for purposes of decision, that such a case must be regarded as falling within the intent of the Act."

² 13 Met. (Mass.) 17.

³ 3 M. & W. 195.

⁴ 130 Mass. 566.

Unquestionably the mortgagee had the latter from the time of the original bargain, but a preference consists, not in making a present to a person who has no right, but in carrying out a contract on which there is merely personal liability. If the court meant to intimate that the mortgagee had a property right, the question then is, when did it arise? It could not arise until the property was identified and acquired by the mortgagor. That it did arise then is the doctrine of *Holroyd v. Marshall*, but this doctrine is denied by the Massachusetts court.¹

The conception, indeed, is not only possible but reasonable that a property right arises, though for reasons of policy based on the apparent ownership of the mortgagor, the right cannot be asserted against creditors. The practical distinction between so limited a property right and a contract right would still have some importance. The mortgagee, if he has a property right, would be entitled to the remedies appropriate to the enforcement of such a right instead of being restricted to an action on the contract. Furthermore, the property right, though not binding upon creditors, would be binding upon one who took the property as a mere successor of the mortgagor. An assignee under a common law assignment is such a successor, and under the Bankruptcy Act of 1867 so was an assignee in bankruptcy.² Again, a purchaser with notice from the mortgagor would be bound by the mortgage if the mortgagee has a right of property, and so perhaps would a creditor who ad-

¹ *Moody v. Wright*, 13 Met. (Mass.) 17; *Blanchard v. Cooke*, 144 Mass. 207; *Moors v. Reading*, 167 Mass. 322; *Smith v. Howard*, 173 Mass. 88.

² This distinction, taken between an assignee in bankruptcy as a mere successor of the bankrupt and an individual attaching creditor who is sometimes entitled to greater rights than his debtor, has been observed in several kinds of cases. An unrecorded chattel mortgage in Ohio was thus held in *Gibson v. Warden*, 14 Wall. (U. S.) 244, 249, effectual against an assignee in bankruptcy though it would not have been against an individual creditor.

In Massachusetts a similar distinction was taken in regard to property sold but not delivered. It might be attached by the seller's creditors (*Dempsey v. Gardner*, 127 Mass. 381; *Hallgarten v. Oldham*, 135 Mass. 1); but would not pass to his assignee in bankruptcy. *Dugan v. Nichols*, 125 Mass. 43. So, an unrecorded deed of real estate, at least prior to the present bankruptcy statute, though it would not protect the property against attachment, would be good against the assignee in bankruptcy. *Smythe v. Sprague*, 149 Mass. 310. The Massachusetts court, however, did not apply this doctrine to unrecorded chattel mortgages, even of existing property. Such mortgages, though upheld by the federal courts, were held ineffectual in the state courts against assignees in bankruptcy. *Haskell v. Merrill*, 179 Mass. 120, 124. As is presently shown (*infra*, p. 579), under the present Act the trustee in bankruptcy must get every right which an individual creditor could get.

vanced his money with knowledge of the mortgage. That there is such a property right seems generally to be the view even of those states which prefer a creditor's seizure to the mortgagee's right,¹ but in a few states the mortgagee's right is nothing more than a contract right. This is clearly the case in Massachusetts. The court of that state has expressly said of such a mortgage that it "is not one that is specifically enforced and it does not create a trust,"² and has enforced the view thus expressed by giving the mortgagee no greater rights against an assignee in bankruptcy than against an attaching creditor,³ and by holding that a purchaser of chattels with notice of an unrecorded agreement to give a mortgage upon them has indefeasible title.⁴ The law of Kentucky seems also to confine the mortgagee's rights strictly to those of contract.⁵

If the mortgagee's right is merely contractual, it should need no argument to prove that it is a preference for the mortgagor to fulfil it when insolvent or in any way to take part in a transfer of property to the mortgagee. And though the creditor seize the property by virtue of a power given to him at the time of the mortgage, the case, though not technically so clear, is within the mischief of the Act if not within the precise language, for there can be no doubt that bankruptcy legislation aims at nothing less than making all creditors share alike who have only contractual rights at the time of insolvency, except in so far as their rights may be satisfied by them when ignorant of the insolvency.

Even if the right be regarded as a property right which attaching creditors can defeat, the result is the same under the present Act. Section 70 a (5) provides that all property of the bankrupt passes "which prior to the filing of the petition . . . might have been levied upon and sold under judicial process against him."⁶ Unless the mortgagee has got possession the trustee in bankruptcy must clearly prevail over him under this provision. Nor will it do for the debtor to turn the mortgagee's equitable right into a legal right by delivering possession. Equitable rights in property may be converted into legal rights, or enforceable rights of any charac-

¹ *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 716; *Mallin v. Wenham*, 209 Ill. 252, 259; *Perry v. White*, 111 N. C. 197; *Williams v. Winsor* 12 R. I. 9.

² *Blanchard v. Cooke*, 144 Mass. 207, 225.

³ See cases cited *supra*, p. 578, n. 1.

⁴ *Smith v. Howard*, 173 Mass. 88. See *contra*, *Dodge v. Smith*, 5 Kan. App. 742.

⁵ *Ross v. Wilson*, 7 Bush (Ky.) 29.

⁶ See *Chesapeake Shoe Co. v. Seldner*, 122 Fed. Rep. 593 (C. C. A.); *Haskell v. Merrill*, 179 Mass. 120, 125; *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641.

ter may be changed into other enforceable rights of no greater value, when the debtor is insolvent and known to be so, but where no enforceable right in property exists it is a preference to give such a right. If the creditor takes the property himself the same question is presented as where he was regarded as having merely a contract right. In both cases, with knowledge of the insolvency, he is endeavoring to convert a right which will be of no avail in bankruptcy into one which is of value.

Under the present Bankruptcy Act, there are special reasons for treating the seizure by the creditor after known insolvency as forbidden. The Act makes it an act of bankruptcy passively to suffer a preference, and though it does not state in terms that any preference suffered may be recovered from one who took knowing of the insolvency,¹ that implication is no more than the courts have made with reference to another act of bankruptcy provided in the statute, — a general assignment. The statute does not say that the property may be recovered by the trustee in bankruptcy from the assignee. Yet it is held that he may do so, irrespective of any fraud in the general assignment.²

An attempt has been made to validate the seizure by the mortgagee by invoking a doctrine of relation.³ The possession acquired by the mortgagee is said to relate back to the date of the mortgage. This, of course, is merely saying that though an essential element of the mortgagee's right has been acquired within the forbidden period, the contrary will be assumed, and that assumption will be acted on. Whether such fictions should ever be allowed as a means of evading the terms of a statute may well be questioned. Certainly, unless there are peculiar circumstances indicating that the case is not within the intent of the statute, and that natural justice requires the words of the enactment to be limited so as not to go beyond the intent, any such evasion is improper.

In view of the provisions just referred to of the existing Bank-

¹ The case seems analogous, in this respect, to a case where a creditor within the four months' period with knowledge of his debtor's insolvency obtains a judgment and levies upon the debtor's property, and the officer actually pays over the amount of the claim. The effect of this does not seem to have been decided as yet. Loveland, in his treatise on bankruptcy, says, p. 568, "It would seem that property so paid to a judgment creditor might be recovered in a proper case under Sec. 60 b, as a preference created by a judgment."

² *Re Gutwillig*, 92 Fed. Rep. 337; *Re Slomka*, 122 Fed. Rep. 630; *Re Knight*, 125 Fed. Rep. 35.

³ *Thompson v. Fairbanks*, 196 U. S. 516, 524.

ruptcy Act, the Supreme Court of Massachusetts held in a recent case¹ that its old rule no longer could prevail, and that the seizure by the creditor when he knew of the insolvency did not help him. The Supreme Court of Vermont, however, had held the contrary a short time before,² and its decision was later affirmed by the Supreme Court of the United States.³ The Massachusetts case had also been carried to the higher court and was shortly thereafter reversed.⁴ The effect of these decisions is that the Bankruptcy Act still leaves it open to the individual states to allow the acquisition of a lien by the mortgagee by taking possession at any time before actual bankruptcy, and it is immaterial that possession is taken with the mortgagor's consent. These decisions seem to the writer both to violate the spirit at least of the Bankruptcy Act, and to produce an undesirable result, but they must be regarded as establishing the law beyond question.

Thus far the question has been considered chiefly with reference to the mortgagor's creditors, but the standpoint of the mortgagor should also be considered. It is a hardship if one who owns property cannot borrow money on the security of it. The owner of a valuable stock in trade cannot raise money upon it and also continue his business unless the law provides some method for enabling him to do so. All that he wishes is to be treated as the owner of property which can be mortgaged to the extent of his existing stock, but in order to do business he must be allowed to sell what he has on hand and substitute other property. Nor will business exigencies make it easy, or even possible, to make changes of specific new property for each article of the existing stock as it is sold. It is possible sometimes to trace the proceeds of the sales of existing goods into the new goods afterwards purchased, but to the mind of the layman a stock in trade has a continuous existence as an entity irrespective of the articles which compose it. This idea has hardly been recognized by the common law, but it rests on a sound basis, and a desirable result in this class of cases cannot be reached without it. A statute, such as that existing in Georgia,⁵ would provide for the difficulty. Record of such

¹ *Tatman v. Humphrey*, 184 Mass. 361.

² *Thompson v. Fairbanks*, 75 Vt. 361.

³ *Thompson v. Fairbanks*, 196 U. S. 516.

⁴ *Humphrey v. Tatman*, 198 U. S. 91.

⁵ Code, § 1954. A mortgage may be made of goods "in bulk, but changing in

a mortgage in the place where the stock in trade was would give reasonable notice to creditors, especially if occasional renewed record were required. The presumption of fraud arising from a right given the mortgagor to deal with mortgaged property as his own¹ is not fairly applied to a case where the mortgagor engages to keep the stock of goods up to a certain point. Though the mortgagor may in such a case sell any of the articles subject to the mortgage, there must continuously remain a security of the same substantial value and of the same general description.

In contrast with the case of a mortgage of a stock in trade, there seems no hardship if a man is not allowed to mortgage possible future acquisitions which are not substitutions for any existing property he may have. In such a case there seems no good reason for seeking to evade the difficulties of the case. Such a mortgage should not be good against purchasers, creditors, or a trustee in bankruptcy, at any rate unless the mortgagee in accordance with a power given to him at the outset has taken possession of the goods prior to bankruptcy. Were it not for the decisions² of the United States Supreme Court already referred to, the further qualification would be added that the possession must be taken by the mortgagee either without reasonable cause to believe the mortgagor insolvent or more than four months before the mortgagor's bankruptcy.

Special statutory provision might well be made, however, for corporate mortgages for a double reason. On the one hand, in order that such mortgages shall be fully effective it is frequently necessary to include future property, and on the other the public

specific." New goods are covered by the mortgage only to the extent of keeping up the original stock. *Chisholm v. Chittenden*, 45 Ga. 213; *Anderson v. Howard*, 49 Ga. 313. To this extent the future goods are covered though bought on credit and unpaid for. *Goodrich v. Williams*, 50 Ga. 425. See further, *Ainsworth v. Mobile Fruit Co.*, 102 Ga. 123. In *Ferguson v. Wilson*, 122 Mich. 97, the mortgage in question covered specific chattels, and also "all other personal property, that may be owned or acquired during such years. The court held that no lien was created by these words as against either purchasers or creditors, and distinguished earlier decisions which had sustained the validity of mortgages of future goods on the ground that in the case at bar the property "was not connected with the business in which the mortgagor was engaged" and "had no relation to that in possession of the mortgagor at the time of giving the mortgage."

The same distinction is taken in *Mississippi Fidelity Co. v. B. F. Sturtevant Co.*, 38 So. Rep. 783.

¹ See *supra*, p. 570.

² *Thompson v. Fairbanks*, 196 U. S. 516; *Humphrey v. Tatman*, 198 U. S. 91.

are much less likely to be deceived than in the case of mortgages by individuals.¹

The whole subject is in so confused a state upon the authorities and its proper solution depends so much on rules of policy that a statute regulating the rights of the parties offers the best solution of the difficulties. If a uniform law could be passed in a number of states the gain would be greater.

A few words may be added in regard to attempted transfers of future personal property otherwise than by mortgage. So far as concerns the propriety of enforcing specifically a contract to give a pledge the reasoning applicable is identical with that appropriate to the case of a contract to give a mortgage. Damages are an inadequate remedy. It seems probable that the English law would recognize that an agreement to pledge future property creates an equitable lien upon the agreed property when it becomes specified.² Such an agreement, however, if written, seems within the statutory definition of a bill of sale,³ and therefore the prohibition of bills of sales of future goods already considered in dealing with contracts to mortgage applies also to contracts to pledge. In this country the rules that require transfer of possession or record of mortgages of chattel property are also generally applicable. A pledge of existing goods derives its efficacy from the possession of the pledgee. Whatever may be the effect of permission to the pledgor to have possession for a temporary and special purpose,⁴ there can be no doubt that the unqualified entrusting of the pledge to the pledgor would destroy the pledgee's security, so far as concerned innocent third persons, whether creditors or purchasers. Equity cannot give a greater effect to a promise to pledge future goods than to a pledge of existing goods of which possession has been surrendered upon the promise of the pledgee still to regard them as security for the debt and to return them upon demand. The situation in the two cases is the same as soon as the future goods come into existence, and before that time there can of course be no question of lien. The decisions, though not numerous, support this view.⁵

¹ There are such statutory provisions in Connecticut and Utah. Conn. Stat. Rev. 1892, § 3806; Utah, Rev. Stat. (1898) § 444.

² See *Martin v. Reid*, 11 C. B. N. s. 730; *Langton v. Waring*, 18 C. B. N. s. 315, where agreements to pledge or charge existing property not delivered were sustained.

³ 41 & 42 Vict. c. 31, § 4.

⁴ See *Jones on Pledges*, § 44.

⁵ *Casey v. Cavaroc*, 96 U. S. 467; *Nisbit v. Macon Bank*, 12 Fed. Rep. 686; *Re*

The reasons justifying a court of equity in taking jurisdiction of a contract to mortgage or pledge personal property obviously do not apply to a contract to sell such property. Nevertheless it seems to have been generally assumed that equity would protect the right of a buyer if he had paid the price or part of it.¹ The vagueness of the reasoning of the court in *Holroyd v. Marshall* and later decisions made it easy to suppose that an agreement to transfer by way of sale stood on all fours with an agreement to transfer by way of mortgage. The two English decisions² which protect the buyer do so not by enforcing the transfer of the property which was promised him, but by giving him a lien on the property for the restoration of the price, but in the first of these cases the court found apparently that such a lien had been contracted for. These decisions are certainly insufficient basis on which to support a doctrine that consideration paid for specified property may be recovered if the property is not transferred and that the property itself stands as security for the enforcement of the right. It is true that if the promisor becomes bankrupt his estate has both the goods and the price for them, but it would be an extreme doctrine in bankruptcy law to hold that this unjust enrichment of the bankrupt estate justifies specific reparation. Every creditor of a bankrupt estate has parted with his money in return for a promise which has not been kept. All are alike in suffering this injustice, and the fact that what one creditor gave or was to receive is capable of identification seems no reason in natural justice why he should be preferred over others whose money has gone perhaps to swell the estate but who cannot trace what they gave or identify what they were promised in return.

Another reason has been suggested for giving the vendee of future personalty in some cases at least a lien upon the property. In a few cases³ the insolvency of the seller has been stated as a

Sheridan, 98 Fed. Rep. 406; *Sabin v. Pond*, 98 Fed. Rep. 974; *Re Klingman*, 101 Fed. Rep. 691; *Hitchcock v. Hassett*, 71 Cal. 331; *City Ins. Co. v. Olmstead*, 33 Conn. 476; *Copeland v. Barnes*, 147 Mass. 388; *Rowell v. Claggett*, 69 N. H. 201. But see *Hook v. Ayers*, 80 Fed. Rep. 978 (C. C. A.); *Huntington v. Sherman*, 60 Conn. 463, 467; *Keiser v. Topping*, 72 Ill. 226; *Tuttle v. Robinson*, 78 Ill. 322.

¹ Benjamin so states the law, § 81. See also *Hamilton v. Nat. Loan Bank*, 3 Dill. (U. S. C. C.) 230; *Post v. Corbin*, 5 B. R. 11; *Scammon v. Bowers*, 1 Hask. (U. S. C. C.) 496.

² *Langton v. Waring*, 18 C. B. N. S. 315; *Young v. Matthews*, L. R. 2. C. P. 127.

³ *Doloret v. Rothschild*, 1 Sim. & St. 590, 598; *Dowling v. Betjemann*, 2 John. & H.

possible ground for enforcing specifically a contract to sell goods of a sort not ordinarily within the jurisdiction of equity, and these suggestions have been adopted in one Illinois decision.¹ If the seller is insolvent, obviously a judgment for damages will not adequately protect the buyer, but on the other hand the law regarding delivery and retention of possession, and also the law of bankruptcy, materially qualify if not destroy the right of a court of equity to enforce the promise. As to delivery and retention of possession it is obvious that a promise to sell future goods can surely have no greater effect than an actual sale of existing goods, so that at least it may safely be said that wherever the latter transaction would not be valid without delivery against creditors of the seller or against purchasers from him, the effect of the former transaction must equally be limited.

But it is the law of bankruptcy that most clearly shows the error of basing an equitable lien on the insolvency of the vendor. Insolvency is the very circumstance which makes it improper for the seller to carry out his contract. Even against the seller himself, when no creditors or purchasers from him have complicated the situation, it cannot be permissible for a court of equity to decree specific performance on the ground of his insolvency in this country while a statute like the present Bankruptcy Act is in force. To do so is nothing less than ordering the defendant to commit an act of bankruptcy; for, since insolvency is regarded as a necessary basis of the equity, until insolvency there is but a contractual obligation, and to satisfy such an obligation is an act of bankruptcy under the present statute, as under the Bankruptcy Act of 1867. Even more clearly, if the rights of creditors or of a trustee in bankruptcy have in fact attached, a court of equity cannot be justified in attempting, in violation not only of the maxim that equality is equity, but also of the spirit if not the letter of a binding statute, to give property to a specific creditor when the only reason for so doing is insolvency, the very state of affairs which is the foundation for proceedings in bankruptcy and the division of the property among all creditors alike.

Samuel Williston.

MAY, 1906.

544; *Dilburn v. Youngblood*, 85 Ala. 449, 451; *Treasurer v. Commercial Co.*, 23 Col. 390, 393; *Williams v. Carpenter*, 14 Col. 477; *Ames v. Whitbeck*, 179 Ill. 458, 475; *Allen v. Freeland*, 3 Rand. (Va.) 170, 174; *Avery v. Ryan*, 74 Wis. 591, 600.

¹ *Parker v. Garrison*, 61 Ill. 250.

CONSTITUTIONAL PROTECTION OF DECREES FOR DIVORCE.

THE Supreme Court of the United States has on the whole been the most highly esteemed court of the land from the professional point of view. It has occasionally delivered an opinion which was questioned by many members of the bar, as in the *Dred Scott* case, and the *Legal Tender* cases; but those decisions found strong support as well as dissent at the bar. It has remained for the present Court to astonish the whole bar of the country.

In the case of *Haddock v. Haddock*, decided April 16, 1906, the Court held that the New York courts are not compelled by the Constitution to give effect to a decree of divorce granted in Connecticut to a husband who had left his wife in New York and acquired a new domicile in Connecticut, where the wife did not appear in the Connecticut suit, and the separation occurred, as the New York court found, by fault of the husband, though the Connecticut court had found the contrary. The New York decree from which appeal had been taken granted the wife a divorce and alimony, notwithstanding the Connecticut decree; and this judgment was affirmed. The opinion was written by Mr. Justice White, with whom concurred the Chief Justice and Justices Peckham, McKenna, and Day. Mr. Justice Brown wrote a dissenting opinion, and Justices Harlan, Brewer, and Holmes concurred in his dissent; and Mr. Justice Holmes wrote a short supplementary opinion.

Before examining the decision critically, it is necessary to determine its exact extent, for its scope is much narrower than is generally realized.

In the first place, the decision is confined to the effect of the constitutional provision. It does not affect the law or the practice of the great majority of states which already as a matter of common law give effect to all decrees of divorce where the libellant was domiciled within the state granting the decree.¹ Though there is

¹ "The right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy." Opinion of White, J., *Adv. Sheets*, p. 5. "It

some doubt as to the law in a few jurisdictions, it is tolerably clear that the only states affected are New York, Pennsylvania, and the Carolinas; and none but New York are certainly affected.

Secondly, it still requires domicile of the libellant in the state of forum to give jurisdiction. Though requiring personal jurisdiction of the libellee in order that the constitutional provision may apply to the decree, the opinion still insists on the domicile of the libellant as necessary to give a decree for divorce any standing.

"As distinguished from legal domicile, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant."¹

Thirdly, while the Court requires in addition to the domicile of the libellant a personal jurisdiction also over the libellee, this jurisdiction may be acquired in one of three ways: (1) by actual appearance in the suit; (2) by actual domicile within the jurisdiction; (3) even where the libellee has left the jurisdiction in which the parties lived together as man and wife, he or she is still subject to the divorce courts of that jurisdiction, which is called the "matrimonial domicile." This point was elaborately laid down by the Court.

"Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause,² to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has moreover been decided that where a *bona fide* domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for a divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause.³ Seventh. So also it is settled that where the domicile

... does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity." *Ibid.*, p. 13.

¹ Opinion of White, J., Adv. Sheets, p. 13, citing *Andrews v. Andrews*, 188 U. S. 14; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 175.

² The significance of these words is not apparent. It is hardly possible that the learned judge means that the binding force of such a decree depends upon the view which another court may take of the goodness of the cause; yet if good cause is a jurisdictional question it may be examined anew in any court.

³ Opinion of the Court, Adv. Sheets, p. 5. For this proposition the Court cited *Cheever v. Wilson*, 9 Wall. (U. S.) 108. In that case the court held that the full faith

of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause."¹

The effect of the decision is therefore confined to a case where the libellant abandoned the libellee wrongfully, left the matrimonial domicile, and acquired a new domicile, not shared by the libellee, in the state of forum.

"Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife. As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that state, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the state or as the result of personal service upon her within its borders."²

and credit clause applied to a foreign decree of divorce, rendered under precisely the circumstances of the case at bar except that the libellee in fact appeared. It was necessary, in order to distinguish the case, to rely upon this fact. The court in *Cheever v. Wilson*, however, did not notice the fact. In his opinion Mr. Justice Swayne said: "The only question is as to the reality of her new residence and of the change of domicile. . . . The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband are of no consequence." Mr. Justice White ignores the *ratio decidendi*; but in order to distinguish *Atherton v. Atherton*, 181 U. S. 155, from the case at bar, he is obliged to rely upon the *ratio decidendi* as stated by the court. This is one of many inconsistencies in the opinion.

¹ Opinion of the Court, Adv. Sheets, p. 6, citing *Atherton v. Atherton*, 181 U. S. 155.

² *Ibid.*, pp. 5, 6.

The scope of this doctrine is, however, broader than it might seem, since the fault of the libellant in leaving the libellee becomes a jurisdictional fact. To grant the original decree, the court must have found the libellant faultless in the matter; but in the second process the original libellee is likely to be the only party represented, and his side alone being heard, the second court will find the original libellant in fault, and therefore the court which rendered the original decree to have been without jurisdiction. This was the course of events in the case at bar.¹

This novel and extraordinary doctrine has never before been suggested by a civilized court or author. The Supreme Court of the United States is entitled to the credit of originality, at least. The following are probably the only views held by civilized courts.

In all European countries, in all European colonies, and in Spanish America the possibility of the wife (who has not obtained a judicial separation) having a nationality, domicile, or residence apart from her husband is not recognized.² In most European states a divorce will be recognized only if obtained in the country to which the parties owe allegiance. In England the divorce will be recognized only when obtained at the domicile of the husband.³ In Scotland and the countries governed by the Roman-Dutch law there is no requirement whatever of nationality or domicile, but residence of the parties for a certain time within the state is sufficient.⁴ In the United States, with hardly an exception, the wife may acquire a separate domicile for the purpose of obtaining a divorce. In all but two or three states, the court of the domicile of either

¹ It is interesting to note that the same thing was true in *Atherton v. Atherton*, as will be seen.

² This statement is subject to certain exceptions. A few of the Protestant states of Germany, Hungary, and possibly other states, permit a wife living apart from her husband to secure naturalization and then to get a divorce; but most states refuse to recognize such a divorce as valid. *De Bauffremont v. De Bauffremont*, Dalloz, 1878, II. 1, 1878, I. 201, 2 Beale's Cases on Conflict of Laws, 99 (France); *In re W's Marriage*, 25 Clunet 385, 1 Beale's Cas. 428 (Austria). In England the court now recognizes the possibility of a wife deserted by her husband obtaining a divorce in the state where they last lived together, irrespective of his present domicile. *Armytage v. Armytage*, [1898] Pr. 178.

³ The court has just recognized an American divorce, obtained at the wife's domicile, where the husband was domiciled in another American state which recognized the divorce, Feb. 22, '06. *Armitage v. Attorney-General*, 22 T. L. R. 306. The court, however, took occasion to reiterate the general principle that "it is the husband's domicile which decides the tribunal to try the cause."

⁴ *Weatherley v. Weatherley*, Transvaal Prov. Rep. 66, 1 Beale's Cas. 420.

party is competent to grant a divorce. In New York and a few states it was held that where the parties had a separate domicile neither state could effectively divorce the parties; but this doctrine was overthrown by the Supreme Court in the case of *Atherton v. Atherton*.¹ The present doctrine, requiring domicile of the libellant in all cases and personal jurisdiction over the libellee in the peculiar sense above explained has been held nowhere.

It is now time to examine in detail the reasoning of the Court. This may be summarized thus: For a valid divorce it is necessary that the libellant should be domiciled in the state which grants the divorce; it is also necessary that there should be personal jurisdiction over the libellee in order that it should be enforceable under the "full faith and credit" clause of the Constitution; but if there is no such jurisdiction over the libellee, the divorce will be valid where granted. I propose to show that either the first or the third proposition is absolutely inconsistent with the second, and with the decision of the Court.

First: that the domicile of the libellant within the state is necessary to give validity to the decree. This proposition was already so firmly established by decisions of the Supreme Court that Mr. Justice White did not question it. But if the domicile of the libellant is required, in order to give the court a jurisdiction which will entitle its decree to extra territorial recognition, it must be that the suit is more than a mere personal suit. Jurisdiction over a plaintiff is obtained by his mere application to the court; his domicile is immaterial to jurisdiction in any personal action. If his domicile is necessary, it is for the purpose of giving jurisdiction over the subject-matter. In other words, the requirement of domicile for jurisdiction is proof that a proceeding for divorce is *in rem*. This has been recognized by every court in which the question has been raised. A status (as distinguished from a mere personal obligation) is a thing, a *res*, over which, by the general consent of civilized nations, some one state has jurisdiction; formerly all nations agreed that this was the state of domicile, but since the Napoleonic legislation and its imitation in the European states it has been on the Continent the state of allegiance.

Mr. Justice White does not agree with this view, it appears; and he repeats several times in his opinion a dilemma which, as he thinks, reduces it to an absurdity in a case where the husband

¹ 181 U. S. 155.

and wife have separate domiciles. "The only possible theory," he says,

"upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that state, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. . . . Nor is the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. . . . Here, again, the argument comes to this, that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state."¹

In answer to this argument it must of course be admitted that the *res*, the status of the parties, is not corporeal; and if the doctrine of jurisdiction *in rem* is to be confined to tangible things there can be no jurisdiction *in rem* over a personal status. But, as we have seen, the common consent of civilized nations grants power over personal status to one proper state; in other words recognizes jurisdiction *in rem* over it. There are many other examples of the same sort of thing; jurisdiction *in rem*, for instance, over the estate of a dead man, including all his incorporeal rights. If then the jurisdiction over a status is jurisdiction *in rem*, is the jurisdiction claimed in this case open to the criticism made several times in the opinion, that the doctrine is self-destructive, because if Connecticut has jurisdiction over the marriage and can dissolve it, this

¹ Opinion of the Court, Adv. Sheets, pp. 9, 10.

amounts to preventing New York, equally a state in which a party to the marriage is domiciled, from exercising the same jurisdiction, so that giving jurisdiction to a state of domicile results in taking away the same jurisdiction from a state of domicile? Such a criticism ignores the real meaning of the word *jurisdiction*. Jurisdiction does not involve the power of continuing rights in existence, but of creating rights; its operation is positive, not negative. Both New York and Connecticut, having jurisdiction over the status of marriage, can affect it by dissolving it; but once it has been dissolved nothing is left for either to affect. The same criticism might be brought against allowing the status of a woman in New York to be affected by a marriage in Connecticut.

The third proposition is equally inconsistent with the second:

"The general rule [requiring jurisdiction over the defendant] is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution."¹

To this proposition the learned judge was driven by the case of *Maynard v. Hill*,² which he cites. In that case the court was called upon to pass upon the validity of a statute divorcing a husband who was within the territory from a wife whom he had deserted and left in another state. The court held that the statute was within the jurisdiction of the legislature; "its jurisdiction to legislate upon his status, he being a resident of the territory, is undoubted."

No distinction was made in this earlier case between the validity of the statute within the territory and its validity everywhere; indeed, it is assumed in the case that the statute was valid everywhere and for all purposes. And it is impossible to discover any legal principle which would justify such a distinction. If the decree was valid in Connecticut, it operated to make the husband there a single man, and if he had there remarried his

¹ Opinion of the Court, Adv. Sheets, p. 4.

² 125 U. S. 190.

second marriage would be legal. Would Mr. Justice White say that he had two wives, one in Connecticut, the other in New York? If he went into New York, could he be compelled, as a result of a suit for restitution of conjugal rights, to live with his first wife? And if so, and he started into Connecticut with her, could he be convicted of adultery upon living with her in Connecticut? Well might Lord Penzance say, in support of the principle that domicile alone can determine jurisdiction for divorce, "An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."¹ The Supreme Court of Illinois criticised the doctrine expressed by Mr. Justice White (which is in fact the New York doctrine which was overthrown in *Atherton v. Atherton*) in language from the force of which it is impossible to escape. The parties to the proceeding were reversed: the husband having remained in New York, and the wife having obtained a domicile and a divorce elsewhere. Mr. Justice Carter said:

"The consequence was that the wife was, and on removing to New York would continue to be, a single woman, who might lawfully marry; while the husband was a married man, having for his wife one who might at the same time become or be the lawful wife of another man. We cannot regard as sound a doctrine leading to such results. We are unable to see the force of the reasoning which is used to support judicial conclusions that one of the married pair may, in one jurisdiction, by virtue of its laws, and in honest compliance with them, obtain a valid decree of divorce, which, as to the one obtaining it, is valid and binding in every state in the Union,² leaving such a one single, and free to remarry in any state, while the matrimonial bonds are still unsevered as to the other party, making him a bigamist should he remarry, and his children, the fruit of such remarriage, illegitimate. It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one. It should not be forgotten that it is the policy of a great majority of the states, and of our own state as well, as established by legislative enactments, to grant judicial decrees of divorce to *bona fide* residents who comply with the statutory requirements where substituted service merely is had upon the non-resident party. To hold such decrees valid only within the jurisdiction granting them, or valid only as to those in whose favor they are granted, leaving the non-resident party still bound, would not only be inconsistent

¹ *Wilson v. Wilson*, L. R. 2 P. & D. 435, 442.

² The force of the reasoning is not impaired because we must here, in accordance with Mr. Justice White's opinion, substitute "almost every state."

with the policy of our own laws, and in violation of interstate comity, but would, when it is considered how great is the number of such decrees entered every year, eventually lead to the most perplexing and distressing complication in the domestic relations of many citizens in the different states." ¹

It has been heretofore believed that the full faith and credit clause required a state to give credit to every judgment which was valid in another state, where it was rendered. If because of lack of jurisdiction of the court the judgment was not binding in another state, it was equally void where it was rendered; for no court can create obligations by acting outside its jurisdiction. In reliance upon this accepted doctrine, the court in *Ditson v. Ditson*,² the leading case on the subject, held that under the Constitution all difficulties were avoided in this delicate subject.

"It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject has been wisely provided against by a clause of the Constitution of the United States, and can find a remedy under it in the Supreme Court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the Constitution of the United States, 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.' As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of the Union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them."

The confidence of this court, which lawyers have so long shared, has been betrayed.

If Mr. Justice White is right in requiring domicile of the libellant for jurisdiction, he is wrong in regarding jurisdiction over the libellee as essential. If he is right in saying the decree is valid in

¹ *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. Rep. 841.

² 4 R. I. 87.

Connecticut, he is wrong in saying it is not binding in New York. His reasoning is certainly novel, and it is certainly wrong; can his conclusion nevertheless be supported? Is the decision right, that some jurisdiction over the person of the libellee is requisite?

In the first place, the authorities are almost without exception against him. The English view has already been expressed. The cases repudiate jurisdiction *in personam* as justifying a divorce in the strongest terms. He enumerates numerous American cases in which jurisdiction was based on domicile alone, and examines a few of them; the character of the examination may be judged from the fact that he classes Massachusetts (in which the English rule is most firmly established) as a state requiring personal jurisdiction over the libellee; that he sees no distinction with regard to jurisdiction between a suit for divorce and one to annul a marriage; and that he cites as cases repudiating any obligation to recognize a foreign decree cases in which the court is enforcing a local statute giving alimony or dower to a divorced wife, although in such cases the distinction is expressly made between recognizing the decree and enforcing the statute.

Mr. Justice White's treatment of the earlier decisions of the Supreme Court is equally unsatisfactory. In several cases the Court had held that domicile of the libellant was required for jurisdiction, and had refused to enforce a divorce granted in a state where neither party was domiciled.¹ In all these opinions (the last of them written by Mr. Justice White) the decision was put solely on the ground that neither party was domiciled within the state. Mr. Justice White in this case, however, requires personal jurisdiction over the party defendant. In *Maynard v. Hill* ² the Supreme Court affirmed the decision of a territorial court, upholding the validity of a divorce granted in the territory to a man domiciled there from his wife, whom he had deserted in Ohio. Mr. Justice White distinguishes this case on the ground that this was an affirmance of the validity of the divorce in the territory only, although no such point was made in the court below. But in *Pennoyer v. Neff*,³ which is cited in the opinion and made the basis of the decision that personal jurisdiction is necessary to give validity to a personal judgment, the question was not of enforcing the judgment in another state

¹ *Bell v. Bell*, 181 U. S. 175; *Strietwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14.

² 125 U. S. 190.

³ 95 U. S. 714.

under the full faith and credit clause, but of upholding it in the state where it was rendered and by statute of which it was valid. The appeal in one case was from the territorial court, in the other from the federal courts of the state.

Though *Maynard v. Hill* could be thus distinguished, *Atherton v. Atherton*¹ could not, for in that case the court had held a Kentucky decree of divorce, in favor of a man domiciled there, entitled to full faith and credit under the Constitution, although the wife was domiciled in New York and never served with process. Here then was a case which could not be explained away; in order to distinguish it, the learned judge pointed out that in that case the woman had left the matrimonial domicile wrongly, as the court in Kentucky found, and was therefore still subject to the court. The difficulty with this distinction is that if her cause for leaving the domicile was a jurisdictional fact, it was open to inquiry in the New York court; and the New York court in that case, as in the case at bar, found that the wife was blameless and that the fault lay with the husband. In other words, the final distinction relied upon by Mr. Justice White in the case at bar turns out not to have existed in fact.

The difficulty on theory with Mr. Justice White's doctrine of the requirement of personal jurisdiction lies in the very nature of divorce. It is not a personal right of the parties. The express assent of both parties to a decree will not justify a court in granting the decree. The decree does not operate *in personam*, and the jurisdiction required is merely a jurisdiction *in rem*. In order to satisfy the requirement of due process of law the absent party must be given reasonable notice and an opportunity to be heard; but jurisdiction over him is not necessary.

The object of the majority was a praiseworthy one: to make objectionable divorces less easy to obtain. But in pursuit of that object they have made a decision which will have an opposite effect. For it gives an easy road to divorce where the parties are agreed in desiring it, since the libellee by appearing and suffering default can render the proceedings valid, and it thus assists collusive divorces. On the other hand, it makes it impossible to secure a divorce that will everywhere be recognized in the one case where all persons admit that a divorce should be granted, that is, where the wife elopes with an adulterer. For if she goes to another state,

¹ 181 U. S. 155.

and the injured husband obtains a divorce in her absence, the state of her new domicile need give no credit to the divorce unless it finds that the fault is with her; and as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own innocence and her husband's fault.

The decision then is opposed to reason, to authority, and to morality; but it will stand until the question is raised again. As Mr. Justice Holmes said in his dissenting opinion, civilization will not come to an end meanwhile.

Joseph H. Beale, Jr.

VESTED GIFTS TO A CLASS AND THE RULE AGAINST PERPETUITIES.

PROFESSOR GRAY, in § 121 b of the second edition of his Rule against Perpetuities, puts this problem: he supposes an immediate vested bequest to the grandchildren of A,¹ a living person, to be paid to them at twenty-five. A has one grandchild *in esse* at the testator's death who is three years old. Is there a valid gift to that grandchild? Professor Gray answers this question in the affirmative.

The learned author concedes that by the usual rule, apart from the Rule against Perpetuities, the expressed intent that the time of payment of the principal of the share of the grandchild *in esse* at the testator's death shall not be paid until he attains, or would have attained had he lived, the age of twenty-five, is valid and enforceable. This is so of course where *Clafin v. Clafin*² is law. It is also the law where the rule of *Saunders v. Vautier*³ is recognized, because the gift is not to an individual, but to a class.⁴ He concedes also that the usual rule for the determination of classes allows the class to increase till the eldest grandchild *in esse* at the testator's death actually reaches, or would have reached if he had lived, the age of twenty-five,⁵ — viz.: possibly more than lives in being and twenty-one years after the testator's death. He also concedes that the mere fact that a gift is vested in some member of the class does not prevent the gift to the whole class being void for remoteness, and that the Rule against Perpetuities causes the gift to the whole class to fail if the maximum number of the class is not ascertained within the proper time, although the minimum number may be.⁶

¹ The actual language used by the learned author is "testator" instead of "A," but the case actually discussed would require the limitations to be either to the great grandchildren of the testator or to the grandchildren of A, a living person at the testator's death.

² 149 Mass. 19.

³ 4 Beav. 115, s. c. Cr. & Ph. 240.

⁴ *Oppenheim v. Henry*, 10 Hare 441.

⁵ Gray's Rule against Perpetuities, 2d ed., § 121 b.

⁶ Gray's Rule against Perpetuities, 2d ed., § 205 a; see also *Pitzel v. Schneider*, 216 Ill. 87.

How, then, in the case put, is the gift to the class to be supported as valid in those members of the class who are *in esse* at the testator's death?

Without attributing to the learned author either of the following views in support of his conclusion, one is presented which, it is thought, would be unsound and another which, it is submitted, is valid.

An attempt might conceivably be made to support the gift to the grandchild of A *in esse* at the testator's death upon the following propositions: in the limitations "to the grandchildren of A to be paid at twenty-five" there are two gifts — one to the grandchildren of A living at his death, and the other to such grandchildren of A as may be born after his death and before the eldest grandchild of A born at the testator's death actually reaches, or would have reached had he lived, the age of twenty-five. These two gifts are each expressly limited by separate and distinct clauses — the one to the grandchildren of A *in esse* at the testator's death by the words "to the grandchildren of A," and the gift to the after-born grandchildren of A by the words "to be paid at twenty-five." The former is valid, and the latter void for remoteness. Under the familiar rule which allows the rejection of modifying clauses¹ the latter may, upon the assumption already made that the two gifts are created by separate and distinct clauses, be disregarded, leaving the valid gift to the grandchildren of A *in esse* at the testator's death to stand.²

Doubt as to the soundness of this solution naturally centers about the correctness of the premise that the gift to the grandchildren of A *in esse* at the testator's death, and the distinct gift to those born afterwards, are limited by separately expressed clauses. Whether doubt on this point be well conceived or not seems to turn more particularly upon whether the words "to be paid at twenty-five" contain the separate gift to after-born grandchildren of A exclusive of the words "to the grandchildren of A," or whether the latter words really contain the gift to the after-born grandchildren. The question then really becomes one of the proper analysis of the operation of the rule for the determination of classes in this sort of a case. If the words "to the grandchildren of A" by their primary meaning include only grandchildren of A at the testator's death, so that the class is enlarged by the presence

¹ Gray's Rule against Perpetuities, 2d ed., c. 13.

² *Ibid.*, 2d ed., § 442.

of the words "to be paid at twenty-five," it is possible of course to argue that the words "to be paid at twenty-five" actually contain the gift to the after-born members of the class. Yet this is an unreal course of reasoning. The words "to be paid at twenty-five" have on their face nothing whatever to do with the gift to after-born members of the class. It is the clause "to the grandchildren of A" which really contains the gift to the enlarged class, even though the enlargement of the class depends upon the words "to be paid at twenty-five." The words "to be paid at twenty-five" merely fix the actual meaning of the words "to the grandchildren of A." The rule of law which the postponement of the period of distribution causes to operate determines the meaning of the words "to the grandchildren of A." You never get away from the fact that the gift to the class is contained in the words "to the grandchildren of A." This view, it is believed, is founded upon the actual reality of the language which we have to deal with. If the words "to the grandchildren of A" by their primary meaning include all the grandchildren of A born at any time, so that the rule for the determination of the class restricts the class to those *in esse* at the first period of distribution, then you cannot possibly say that there is any gift to after-born members of the class in the words "to be paid at twenty-five." The whole gift, to whomsoever it may be, comes from the words "to the grandchildren of A."

So much, then, for the consideration of this solution of our problem apart from authority. Are there any settled results which throw light upon whether the words "to be paid at twenty-five" contain a separate and distinct gift to grandchildren born after the death of the testator?

Reliance might, perhaps, be placed upon *Clobberie's Case*.¹ There it was held that a legacy to A *to be paid* at twenty-one gave A at once an interest transmissible to his executors. It has since become the law that the expressed intent that the legacy shall not be payable to A until he reaches twenty-one is valid, while an expressed intent that a legacy shall not be payable until after the majority of the beneficiary is invalid and unenforcible.² What possible significance, however, do these results have upon our problem? *Clobberie's Case* holds that certain language means that an immediate interest is given to A, but that the actual trans-

¹ 2 Vent. 342.

² *Saunders v. Vautier*, 4 Beav. 115, s. c. Cr. & Ph. 240.

fer of the principal to the legatee shall not be made till a future time, and that this intent is lawful provided the postponement be not beyond the minority of the legatee. If the postponement was to last beyond that time it was illegal and could not be carried out. These results throw absolutely no light whatever upon the question whether, where the gift is to a class to be paid at twenty-five, there is a separately expressed gift to after-born members of the class contained in the words "to be paid at twenty-five."

Leake *v.* Robinson¹ furnishes a strong argument against the view that the words "to be paid at twenty-five" contain a separate and distinct gift to grandchildren born after the death of the testator. Under that case, if the limitations are contingent, *i. e.* "to such grandchildren of A as reach twenty-five," and there are grandchildren *in esse* at the testator's death, all under four years of age, you cannot say that there are two gifts — one to the grandchildren of A *in esse* at the testator's death who reach twenty-five, which is valid, and the other to after-born grandchildren of A who reach twenty-five, which is too remote, and then reject only the latter on the ground that the gifts are expressed separately. The reason is that there is no express separation of the gift to the two different classes of grandchildren. There is, on the contrary, only a singly expressed gift to the whole class. You cannot argue that the primary meaning of the words "to such grandchildren of A as reach twenty-five" includes only grandchildren of A living at the testator's death who reach twenty-five, and that the class is allowed to increase, so as to include after-born grandchildren of A till the first reaches twenty-five, by reason of the fact that a contingency is introduced in the words "to such as reach twenty-five." You cannot then go on to conclude that the gift to after-born grandchildren of A is contained in a separate clause making the gift contingent so that it may be rejected by itself, leaving the contingent gift to grandchildren of A *in esse* at the testator's death to stand. Why is it any more allowable, when the gift is vested "to the grandchildren of A to be paid at twenty-five," to say that the primary meaning of the testator's language includes only grandchildren of A *in esse* at the testator's death, but that the words "to be paid at twenty-five" make a new and distinct gift to after-born grandchildren of A? As a matter of fact, however, the Master of the Rolls in Leake *v.* Robinson intimates that the primary and natural meaning of "grandchildren of A to be paid at twenty-

¹ 2 Mer. 363.

five" or "who reach twenty-five," includes all the grandchildren of A born at any time, and that the rule for the determination of classes restricts the natural meaning of the words used because of the inconvenience arising from the natural construction.¹ This is the position Mr. Gray himself approved in the first edition of his Rule against Perpetuities.² May not this opinion of the learned author still be the correct one? In this view the primary meaning of a vested gift "to the grandchildren of A to be paid at twenty-five" is plainly a gift to *all* the grandchildren of A born at any time. The words "to be paid at twenty-five," then, restrict the primary meaning, and there is no possible ground for contending that these words contain a distinct gift to after-born grandchildren of A which is expressly separable from the gift to the grandchildren of A *in esse* at the testator's death.

It is believed, however, that the natural desire of courts to sustain the gift to the members of the class *in esse* at the testator's death may be accomplished by the application of a general principle already fully established in England and now rapidly shaping itself to meet the situation in the jurisdictions in this country where *Clafin v. Clafin* is law.

Where the limitations are to the grandchildren of A to be paid at twenty-five, the after-born members of the class are let in, whether by way of enlargement of the naturally indicated class or by way of restriction of it, because the postponement of the first period of distribution till the eldest reaches twenty-five, or would have done so had he lived, is recognized as valid and enforceable. If, then, there is any ground upon which, consistently with its validity in general, the postponement can be regarded as void and unenforceable in this case, then the future period of distribution will cease to exist, and under the usual rule for the determination of classes, the class will close at the testator's death. This ground is most clearly available, and no one has pointed it out more forcibly and accurately than Mr. Gray himself. When it became clear in England that restraints on the alienation of the absolute equitable interest of a married woman were valid, the question naturally

¹ He says: "Indeed, I believe, wherever a testator gives to a parent for life, with remainder to his children, he does mean to include all the children such parent may at any time have. That is not an artificial rule. It is the rule which excludes any of the children that is, and has been called an artificial rule — namely, the rule in *Andrews v. Partington*, 3 Bro. Ch. 60, 401, and other cases of that description, which excludes all who may be born after the eldest attains twenty-one."

² § 639.

arose whether any restriction upon their creation should be imposed. The point was presented for adjudication when the absolute equitable interest had vested in an individual within lives in being and twenty-one years, but where the restraints on anticipation might possibly occur or continue beyond that time. It became settled that the restraints on alienation were invalid under such circumstances.¹ It was said that this was so because the Rule against Perpetuities applied. With this reasoning Jessel disagreed, and Mr. Gray has now most clearly pointed out that Jessel was correct in saying that the Rule against Perpetuities had nothing to do with the matter.² It follows, therefore, that the result reached by the English cases is simply the establishment of a special rule — entirely distinct from the Rule against Perpetuities — limiting the extent to which restraints on alienation, usually valid, may be created. In the same way, when you come to an American jurisdiction where *Clafin v. Clafin* is law, it becomes absolutely necessary to put some limits upon the length of time that the trust of an absolute indefeasible equitable interest may be made indestructible. The direct authority of the English cases which have dealt with the restraints on anticipation attached to a married woman's estate, and the suggestion of the courts of Massachusetts,³ Illinois,⁴ and Pennsylvania⁵ all indicate that the rule will probably be well settled here that language which, if carried out as expressed, may possibly cause the trust of an absolute indefeasible equitable interest to be or remain indestructible at a time beyond the period of a life or lives in being and twenty-one years, will be unenforcible. It cannot of course be too emphatically stated that this is not the Rule against Perpetuities, but a new rule limiting the time that the trust of an absolute indefeasible equitable interest may be made indestructible.⁶ No reason is perceived why this same principle should not operate where the rule of *Oppenheim v. Henry* applies; that is, where the gift is to a class with a postponement. When, therefore, the limitations are "to the grandchildren of A to be paid at twenty-five" and one grandchild

¹ Gray's Rule against Perpetuities, 2d ed., § 432 *et seq.*

² Gray's Rule against Perpetuities, 2d ed., § 121 f.

³ Winsor v. Mills, 157 Mass. 362.

⁴ Kohtz v. Eldred, 208 Ill. 60, 72.

⁵ Shallcross's Estate, 200 Pa. St. 122 (1901). See also a statutory provision to the same effect in Kentucky: Ky. Stats. (1903) § 2360; *Johnson's Trustees v. Johnson*, 79 S. W. Rep. 293 (Ky., 1894).

⁶ Gray's Rule against Perpetuities, 2d ed., § 121 i.

of A is *in esse* at the testator's death and under four years of age, it is clear that the postponement is sure to last for too long a time. The expressed intent is, therefore, unenforcible, and the gift is to the grandchildren of A simply. Those, therefore, who are *in esse* at the testator's death take by the usual rule for the determination of classes.

This is precisely the solution of the problem which Mr. Gray made in the first edition of his Rule against Perpetuities,¹ except that there he regarded the postponement as void by the rule of *Saunders v. Vautier*. This necessitated the position that *Oppenheim v. Henry* was wrong. Now, however, it is clear that *Oppenheim v. Henry* is sound, but that there is a limit set to the power of the settlor to create a postponement even where the gift is to a class. That limit requires that the postponement must not exist beyond a life or lives in being and twenty-one years. It is submitted that it would be wiser to continue the view of the first edition with this change than to enter upon the difficult course of trying to split up the limitations "to the grandchildren of A to be paid at twenty-five" into two separately expressed gifts — one to the grandchildren of A *in esse* at the testator's death, which is valid, and the other to the grandchildren of A born afterwards, which is too remote.

Albert Martin Kales.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

NOTE. — I am much obliged to Professor Kales for pointing out (as he does in the first note to his article) that the case put in § 121 *b* does not raise the question intended to be discussed. The devise should read "to the grandchildren of A" (or to the great grandchildren of the testator, or on some such limitation), "to be paid to them when they reach twenty-five."

The first part of Mr. Kales's article is devoted to demolishing a "conceivable" adversary who is supposed to say that the devise consists of two gifts. There is somewhere in the books — I believe it is in the Kentucky reports — a case where a judge, irritated past endurance by the stupidity of a plaintiff, exclaims, "And what has this blooming geranium of a plaintiff to say?" The appellation is a trifle vague, but it somehow fits this "conceivable" gentleman. He is a foeman quite unworthy of Mr. Kales's skillful rapier. I certainly shall not come to his assistance. Let him be anathema.

The true view is, of course, that there is a single gift with a qualification, modification, or proviso attached.

The latter part of Mr. Kales's article raises a curious question. It can be put as well, and more simply, by a gift to an individual. Suppose, in a *Clafin* country, a legacy is given to the first-born son of A, to be paid him when he

¹ § 638.

reaches twenty-five. A is at present a bachelor. I trust I have shown that the estate to A's first-born son does not violate the Rule against Perpetuities, since it begins within the required limits ; I do not understand that Mr. Kales differs from me in this.

But he says: *Clafin* courts must adopt some period beyond which enjoyment cannot be postponed; they will probably take it from the Rule against Perpetuities. This is certainly very likely.

Then the question comes up: From what date is this period to run? If it is to run from the testator's death, then the postponing clause is void. If it is to run from the beginning of the interest which is subject to the postponing clause, then that clause is good. Mr. Kales thinks it will be the former. If I were to guess, I should be inclined to venture an ambulatory guess that it will be the latter.

It seems a troublesome and difficult question. I feel no present call to enter upon it.

"Suave, mari magno turbantibus aequora ventis,
E terra magnum alterius spectare laborem."

or, translating rather freely:

"Pleasant it is, from the firm land of the Common Law, to watch the votaries and victims of *Clafin v. Clafin* tossed among its rocks and quicksands."

John C. Gray.

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WHAT LAW GOVERNS CONTROVERSIES BETWEEN STATES. — The Federal Constitution vests in the Supreme Court jurisdiction over "controversies between two or more states." In the first important interstate controversy¹ that was brought before the Court, counsel for the defendant, in arguing for a demurrer to the jurisdiction, insisted that since the Constitution prescribed no rule of law to govern such cases, and as the common law had never been applied to the acts of states, there was no rule of law creating a cause of action, and hence that the declaration was demurrable. The Court, however, seems to have acted upon the suggestion of the opposing counsel and to have decided the case according to the principles and rules of justice, equity, and good conscience. But, as the Court is engaged principally in administering the common law, and as this case appears actually to have been decided according to common law principles, it amounted to an application of the common law. In subsequent boundary disputes² between states the Court seems to have followed this first case, and to have determined the matter according to common law notions. However, in dealing with states certain cases do arise in which the rules of the common law, which were evolved to govern the actions of individuals, might not be applicable; and one of the important unsettled problems which the Supreme Court must face is under what circumstances will the common law be unfit to decide state controversies, and what principle can be substituted for it.

In the recent case between Missouri and Illinois, in which the former asked for an injunction to restrain Illinois from permitting the sewage of Chicago to be conveyed into the Mississippi River by way of the drainage canal and the Illinois River, Mr. Justice Holmes questions whether the rules that obtain between individuals to determine what is

¹ Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 4 How. (U. S.) 591.

² Virginia v. West Virginia, 11 Wall. (U. S.) 39.

a nuisance can be applied between states. He suggests that there must be such a pollution of the stream as would amount to a *casus belli* between independent nations to justify the Court in issuing an injunction. *Missouri v. Illinois, etc.*, 200 U. S. 496. There is a previous *dictum*³ of the Court which seems contrary to this view and which intimates that the same rules for determining the existence of a nuisance as between individuals should be applied in controversies between states. That would certainly seem to be the better view. There is nothing in the nature of a state which justifies it in doing to another state what an individual cannot do to another. The only cases in which the Court had suggested that a special rule should be adopted to govern states were where the question is what lapse of time should be sufficient to create a title to land by prescription,⁴ and the reason for a distinction in this class is that a state is much slower to act than an individual. But in these cases the Court is really applying the common law doctrine of prescription, though adopting a different measure of time to suit the exigencies of the occasion. So, too, in stating that fraud⁵ and illegality⁶ are defenses to interstate contracts the Court apparently applied the notions of justice derived from the common law; and no reason appears why a case of nuisance should not be treated in the same way.

REVOCATION WITHOUT HEARING OF ASSIGNABLE LIQUOR LICENSE. — In the case of *Yick Wo v. Hopkins*¹ the Supreme Court of the United States held that a statute vesting uncontrolled discretion in a commission to grant licenses to operate laundries in wooden buildings was unconstitutional, since the discrimination between those who did and those who did not meet the approval of the commission was arbitrary and unjust. In a later case² the Court held that discretion could be given to a commission to grant licenses to sell liquor, and distinguished the preceding case on the ground that the laundry business, unlike the liquor business, could not have been entirely prohibited. Statutes have also been sustained which invested officials with authority to grant or withhold without any hearing licenses to move houses along the street,³ to orate on Boston Common,⁴ to sell cigarettes,⁵ to maintain a cow-barn in the city,⁶ and, finally, to retail milk.⁷ In the last case, if not in several of the others, the business could not be entirely prohibited, and hence this means of distinguishing the *Yick Wo* case failed. Indeed these cases virtually overrule that decision, and indicate that the Supreme Court is recognizing the evident policy of relying on men's judgment in the administration of the laws, and of interfering only when this discretion is abused.

³ See *South Carolina v. Georgia*, 93 U. S. 4, 14.

⁴ *Indiana v. Kentucky*, 136 U. S. 479.

⁵ *Virginia v. West Virginia*, *supra*, at 61 *et seq.*

⁶ See *Houston, etc., Co. v. Texas*, 177 U. S. 66, 97.

¹ 118 U. S. 356.

² *Crowley v. Christensen*, 137 U. S. 86.

³ *Wilson v. Eureka City*, 173 U. S. 32.

⁴ *Davis v. Massachusetts*, 167 U. S. 43.

⁵ *Gundling v. Chicago*, 177 U. S. 183.

⁶ *Fischer v. St. Louis*, 194 U. S. 361.

⁷ *People, etc., Lieberman v. Van De Carr*, 28 Sup. Ct. Rep. 145.

Another most interesting aspect of these decisions concerns the question whether a hearing must be granted the prospective or actual licensee. In the cases that have been cited, the court did not consider this question, but simply affirmed the action of the officials in denying or revoking a license without a hearing. One court, however, has reached the same result on consideration.⁸ Some *dicta* of the state courts⁹ and of the Supreme Court¹⁰ might justify such a practice in the case of liquor licenses on the ground that, since the state may prohibit the traffic, it may grant or revoke the privilege of engaging in it at its pleasure, — that, therefore, such a right is no longer a property right. The objection to this reasoning is that regulation is not prohibition: and, as the trade is merely regulated, persons still retain a really valuable right to engage in it. In addition, the Supreme Court decision allowing the revocation of a license to retail milk without a hearing,¹¹ since it cannot be sustained on the ground that the selling of milk is a privilege, suggests that some other principle is involved. The Court has held that in administering a statute vesting a commission with the power to prescribe reasonable railroad rates, the commission must grant a hearing to the road whose rate is in question.¹² In the cases under consideration, absolute discretion has been given to the commissioners, and perhaps the distinction is that if the statute prescribes a rule which the board must apply, a hearing must be granted, whereas if there is no rule in granting licenses beyond such as may be formulated by the board itself, a hearing is unnecessary because futile. It certainly seems unnecessary to require that a licensee be given a hearing when there is no fact the proof of which will entitle him to a license, since obviously he cannot prove that the commission thinks he ought to have such a license. Of course the weakness of this reasoning is that the licensee might at a hearing present such cogent reasons in favor of his application as should influence the decision of a reasonable commission. In view of this the inference is strong that this administrative process is becoming due process of law in certain cases. In a recent New York case the statute vested a commission with power to revoke licenses having a surrender value, if the licensee did not conform to the building laws. If the above distinction is valid the court decided properly in holding that a hearing must be granted in such a case, for here the statute prescribed the test, — *viz.* compliance with the building statutes. *People ex rel. Loughran v. Flynn*, 110 N. Y. App. Div. 279.

ULTRA VIRES CONTRACTS IN THE FEDERAL COURTS. — When the courts began to abandon the conception that corporations were from their intrinsic limitations incapable of making *ultra vires* contracts, and to treat the matter as one of right rather than of power, they had to cast about for a new theory by which to regulate their decisions. It might have been held that *ultra vires* contracts, though existing, were simply illegal, but on account of its obvious harshness, this rule has not been generally applied.¹ On the other hand, the courts might have treated *ultra vires* acts somewhat in the

⁸ United States *ex rel.* Roop *v.* Douglass, 19 D. C. 99.

⁹ See *Sherlock v. Stuart*, 96 Mich. 193; *Sprayberry v. City of Atlanta*, 87 Ga. 120.

¹⁰ See *Crowley v. Christensen*, *supra*, at 91.

¹¹ *People, etc., v. Lieberman v. Van De Carr*, *supra*.

¹² *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 457.

¹ See *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24.

fashion of the acts of *de facto* corporations, and have held them good between the parties, though cause for a visitation by the state.² But to prevent a dangerous indefiniteness of the scope of corporate activities, and perhaps to protect innocent stockholders, it has been deemed expedient to supplement the fear of *quo warranto* proceedings by an additional deterrent acting directly through the self-interest of the parties. In consequence there has been generally adopted a working rule lying half way between the two above suggested, and making an *ultra vires* contract neither quite void nor voidable by any particular party, nor yet quite good; but a thing which is a type unto itself, — bad unless there is some reason of justice or expediency to the contrary. Thus a wholly executory *ultra vires* contract is treated as if illegal,³ but if one side has performed, so that such treatment would cause hardship, a remedy is given.⁴ There are a few states of fact where the courts sometimes diverge from this rule and give relief on the contract when the demand of justice is not imperative,⁵ and now and then, but rarely, a case errs in the other direction.⁶

The federal courts still profess to adhere to the ancient doctrine, declaring as to the *ultra vires* contract "not merely that the corporation ought not to have made it, but that it could not have made it."⁷ The decisions in these courts, however, generally harmonize with the rule applied in most other jurisdictions, yet some cases there are which emphatically cannot be so explained. *First National Bank v. Converse*, U. S. Sup. Ct., Feb. 19, 1906.⁸ In this it is held that a corporation cannot be charged with the statutory double liability on stock which it holds *ultra vires*. The contract is treated as illegal or non-existent, although there is a strong reason of justice to the contrary, for the innocent creditors of the insolvent corporation are deprived of their security, while the purchasing corporation, after receiving the dividends on its stock and all the benefits which would have accrued to any holder, is exonerated. The federal courts cannot consistently base this decision on the ground that a corporation cannot do an *ultra vires* act, for they have already handed down other decisions explicable only upon the opposite theory, as where they allow a corporation to bring ejectment against a stranger in possession of land which it was *ultra vires* for the corporation to hold,⁹ a result impossible unless the corporation did in fact have title; or where they enjoin a lessor from re-entering or refuse to assist him in recovering possession before the expiration of an *ultra vires* lease,¹⁰ — an obvious recognition of the existence of the lease. Nor can the principal case be explained upon the ground that the *ultra vires* contract, though existing, is simply illegal, for the federal courts have abandoned that position by allowing a quasi-contractual recovery for goods or services furnished under *ultra vires* contracts.¹¹

² See *Farrington v. Putnam*, 90 Me. 405.

³ See *Great Northern Ry. v. Eastern Counties Ry.*, 9 Hare 306.

⁴ See *Bath Gas Light Co. v. Claffy*, *supra*.

⁵ See *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. Justice might here have been satisfied by a recovery in *quantum meruit*, but the contract price of goods delivered was allowed.

⁶ *Marble Co. v. Harvey*, 92 Tenn. 115.

⁷ See *Central, etc., Co. v. Pullman, etc., Co.*, 139 U. S. 24.

⁸ *California Nat'l Bank v. Kennedy*, 167 U. S. 362, *acc.*

⁹ *Cowell Co. v. Springs*, 100 U. S. 55.

¹⁰ *American Union Telegraph Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 188; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393; *Cf. Nat'l Bank v. Matthews*, 98 U. S. 621.

¹¹ *Logan Co. Nat'l Bank v. Townshend*, 139 U. S. 67.

THE DEVOLUTION OF THE PERSONAL PROPERTY OF ENGLISH CORPORATIONS ON DISSOLUTION.—The ancient rule of the common law probably was that upon the dissolution of a corporation its personal property went to the crown as *bona vacantia*.¹ In 1898 it was held by the Court of Queen's Bench, in a well considered opinion, that the right of a corporation to prove for a debt against a bankrupt's estate passed to the crown upon the corporation's dissolution.² This confirmed what was commonly supposed to be the law as to personalty in general, though there had previously been a widespread³ and probably erroneous⁴ idea that a corporation's choses in action died with it. In 1903 we find an apparent departure from the law as laid down in the Queen's Bench. A corporation which owned the mortgage of a leasehold, went into voluntary liquidation and contracted to sell all its assets to a second corporation. By mistake no assignment of the mortgage was executed, although the price had been received. The vendor corporation was then dissolved and later the vendee corporation petitioned the court of chancery for an order vesting in it the mortgage. Farwell, J., in an opinion only six lines long, and making no reference to a possible right of the crown, granted the petition.⁵ In the following year this was explicitly overruled by a second chancery case. Here a corporation contracted to sell a patent and received the consideration, but was dissolved before assignment. It was held that no trustee of the patent could be appointed, the court apparently going on the theory that the right returned to the crown, which could not be charged as trustee or otherwise interfered with under the statute.⁶ If the matter had rested here, the law would have seemed plain enough; but the whole question has been thrown into uncertainty again by a third chancery case, the facts of which are similar to those on which Mr. Justice Farwell's order was based, except that a leasehold instead of the mortgage thereof was the *res*. Here an order was made vesting the lease in a new trustee to hold for the purchaser in place of the defunct corporation. *Re No. 9, Bamare Road*, [1906] 1 Ch. 359. This case is contrary to the weight of preëxisting authority and appears to be based in part on a supposed analogy to a well known decision of earlier date where the corporation was in fact a native of Hanover, so that its property could not be expected to pass on dissolution to the English crown.⁷ Still, the result of the principal case is just and accords well with the spirit of modern jurisprudence. It may be noted in passing that in the two cases cited, where the crown's right was not recognized, the *res* were chattels real, and that real estate proper was never supposed to pass to the crown.⁸ This question is of little importance in the United States owing to omnipresent statutes providing for receivers,⁹ and in England occurs only in the case of assets discovered after the termination of the winding-up proceedings.¹⁰

¹ See 2 Kyd, Corp. 516. Cf. statements of counsel arguing in *Colchester v. Scafer*, 3 Burr, 1866, 1868. See 2 HARV. L. REV. 164.

² *Re Higgins and Dean*, 79 L. T. R. 673. Cf. 12 HARV. L. REV. 558.

³ See 1 Bl. Com. 484.

⁴ See *Naylor v. Brown*, Cas. t. Finch 83. See 2 HARV. L. REV. 165.

⁵ *Re General, etc., Co., Ltd.*, [1904] 1 Ch. 147. The same judge has since made another order of like nature. *Re Richard Mills & Co., Ltd.*, [1905] W. N. 36.

⁶ *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737. See Lewin, Trusts, 9th ed., 28, 29.

⁷ *King of Hanover v. Bank of England*, L. R. 8 Eq. 350.

⁸ See 1 Bl. Com. 484.

⁹ See 12 HARV. L. REV. 558. See also Morawetz, Private Corp., 2d ed., 990.

¹⁰ See Companies Winding-up Act, 1890.

CIRCUMSTANCES UNDER WHICH POLITICAL SUBSCRIPTION FROM CORPORATE FUNDS IS LARCENY. — Section 528 of the New York Penal Code provides in part: "A person who, with intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker or any other person . . . having in his possession, custody or control as . . . officer of any . . . corporation . . . any money, . . . appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny." The relator, vice president, and a member of the finance committee of the New York Life Insurance Co., was arrested under this statute for larceny of the Company's funds. He brought writs of *habeas corpus* and *certiorari*, to test the sufficiency of the depositions on which the magistrate issued the warrant. The depositions showed that the defendant received money from the funds of the Company as reimbursement for money advanced by him as a campaign contribution, on behalf of the Company, to the Republican National Committee. The books of the Company did not disclose the purpose of the payment to the relator. The relator further deposed that he received no personal advantage from the transaction, that he acted solely in the interests of the Company and without misgivings as to the propriety of the act, believing a Republican victory essential to the prosperity of the Company. The action of the finance committee in assenting to the repayment was purely informal. The court dismissed the writs, on the ground that the depositions showed evidence sufficient to warrant a jury in finding that the relator had been guilty of larceny under the statute. *People ex rel. Perkins v. Reardon*, 35 N. Y. L. J. 226 (N. Y. Sup. Ct., April 19, 1906).

It is evident that the statute demands a specific intent to deprive the owner of his property,¹ and clearly the depositions of the relator to the effect that he had no suspicion of the illegality of his acts and acted for the sole purpose of benefiting the corporation are inconsistent with the existence of such an intent. It would appear, therefore, that what the court had to decide was simply whether the other facts deposed to were such as might justify a jury in finding that the above assertions of the relator were untrue.

The reasoning by which the court arrived at its conclusion is not altogether free from uncertainty. A large portion of the opinion is devoted to emphasizing a distinction between *ultra vires* acts illegal in themselves as against public policy and those merely unauthorized. If the distinction is taken merely to show that the specific intent to defraud is more easily inferable from the former sort of *ultra vires* acts this is undoubtedly correct. Much, however, that the learned judge says on this point may well leave it doubtful whether he is not proceeding on the theory that the illegality of the act supplies the necessary criminal intent. If this is, indeed, the theory of the decision it would seem manifestly incorrect, for, the required intent being specific, the doctrine of constructive intent has no application.²

In short, proceedings under this statute do not seem to involve the law of *ultra vires* at all, except in so far as the moral quality of the particular *ultra vires* act in question may aid in ascertaining *as a fact* the intention with which it was done, or, concretely, in negating the relator's professions of ignorance of the law, and of benevolent intentions. From this point of view the

¹ *People v. Moore*, 37 Hun (N. Y.) 84.

² See May's Crim. Law (2d ed.) § 34; see *Dobbs's Case*, 2 East P. C. 513.

distinctions drawn by the court between different sorts of *ultra vires* acts were perhaps relevant, and the facts deposed to would certainly seem to have warranted the dismissal of the writs.

ACCEPTANCE OF A DEED OF CONVEYANCE BY THE GRANTEE. — In the usual case of a conveyance of land, acceptance by the grantee constitutes part of the delivery of the deed. A good delivery may be effected, however, where the deed is given to a third party for the grantee, or even where the grantor himself retains possession of the instrument.¹ In these two latter instances the question arises, how far an acceptance by the grantee, independent of such delivery, is essential to the passing of title. The English courts, though somewhat wavering, take the position that no acceptance is necessary.² The American courts, while ostensibly almost unanimous in asserting the necessity of acceptance,³ are really in conflict on the question. The apparent weight of authority holds that where the deed is beneficial to the grantee, acceptance will be presumed in the absence of actual dissent;⁴ but a strong minority of decisions insists that even here actual assent by the grantee is a prerequisite to the passing of title.⁵ How far the presumption doctrine has been carried is well illustrated by a recent Arkansas case, where a deed running to the wife, duly executed and delivered by the husband to a third party, was held to pass an immediate title, although it plainly appeared that the wife was ignorant of the existence of the deed until after the death of the grantor. *Russell v. May*, 90 S. W. Rep. 617.

The modern rule requiring a grantee's assent to a conveyance is said to have been established to obviate the practical difficulty of having title with its possible burdens forced upon an unwilling grantee, and is based, as a matter of theory, upon the conception that the transaction is contractual in its nature.⁶ The fact that an insane person is capable of taking as a grantee⁷ is, however, fatal to the theory of the doctrine; and, on the practical side, though the requirement of actual consent does rescue a grantee from forced burdens, it also deprives him of benefits, since the rights of attaching creditors and other third parties against the grantor accruing between the delivery and assent, must prevail against the grantee.⁸ The presumption of acceptance in the case of beneficial grants substantially relieves the latter situation, but at the expense of grafting another odious fiction upon the law. One situation, however, even this doctrine fails to meet satisfactorily. Where land is conveyed upon trust the deed cannot be regarded as beneficial to the grantee, and the basis of the presumption must fail, thus defeating the trust. The courts, however, have squarely met this situation by vesting title in the trustee without his assent, subject to the right of disclaimer.⁹ The same rule is applied in the case of title passing to a devisee,¹⁰ a disclaimer in either

¹ *Thompson v. Candor*, 60 Ill. 244; *Exton v. Scott*, 6 Sim. 31.

² *Thompson v. Leach*, 2 Vent. 198; *cf. Siggers v. Evans*, 5 E. & B. 367.

³ But see *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 271.

⁴ *Mitchell v. Ryan*, 3 Oh. St. 377; *Wuester v. Folin*, 60 Kan. 334.

⁵ *Welch v. Sackett*, 12 Wis. 243.

⁶ *Ibid.*

⁷ *Campbell v. Kuhn*, 45 Mich. 513.

⁸ *Welch v. Sackett*, *supra*; *Knox v. Clark*, 15 Col. App. 356.

⁹ *Adams v. Adams*, 21 Wall. (U. S.) 185; see Ames, *Cases on Trusts*, 2d ed., 229 n.

¹⁰ *Tarr v. Robinson*, 158 Pa. 60.

instance relating back so as to remove any burdens imposed. It is difficult to distinguish in principle between a conveyance upon trust and an absolute conveyance, so that the doctrine of title passing without the assent of the grantee subject to disclaimer would seem to be perfectly applicable to both cases, thus attaining the practical benefit of the rule requiring assent without incurring its objectionable features.¹¹

LIABILITY OF CORPORATION DIRECTORS FOR NEGLIGENCE. — It is well settled that directors of corporations are personally liable to the corporation for losses caused by their negligence, but there is a wide variance in the language used by the courts to define the degree of care imposed upon them. The cases which profess to set the most severe standard cite *Hun v. Cary*¹ to support the proposition that directors are bound to use the high degree of care which men prompted by self-interest generally exercise in their own affairs. Other cases, like a recent Kentucky decision, purport to adopt a milder rule, for which *Spering's Appeal*² is relied upon, namely, that directors are liable only for carelessness so gross as to be conclusive evidence of fraud. *Ebelhar v. German American Security Co.'s Assignee*, 91 S. W. Rep. 262.

Differing so widely in their statement of the director's duty, the two groups of cases seem at first sight to be in sharp conflict, but an examination of their facts shows that, in reality, they are governed by the same rule. The correct principle, and the one actually underlying the decisions, is that directors in any corporation must devote the amount of care to the business which ordinary men would give under the circumstances.³ *Hun v. Cary*¹ was an action against the directors of a savings bank, and the defendants were held to a high degree of care. As savings banks solicit the business of small depositors who are seeking safety for their earnings rather than a high rate of interest, and as the men who act as directors of such institutions realize that the confidence reposed in them by the depositors puts them in a fiduciary position, the decision was in harmony with the principle stated above. So high a standard has not yet been applied to cases other than those involving savings banks, but it seems that the same reasoning would apply to the directors of modern life insurance companies. In *Spering's Appeal* the corporation was conducted merely for profit, and the duty of care actually required was slight. This decision, too, conforms to the correct principle. The directors of an ordinary corporation are men who have not time to watch the details of the corporate business and who frequently do not understand them. They are not expected to devote the same amount of attention to the business as savings bank directors. As to their acts of commission, all that the law requires is that they exercise an honest judgment on the questions coming before them. They are not responsible for mistakes of judgment, however foreseeable they may have been, nor do they guarantee the possession in themselves of skill and business acumen.⁴ When loss results because of their omissions, such as failure to detect dishonest employees, they are ordi-

¹¹ See 14 HARV. L. REV. 456; Tiffany Real Property, § 407.

¹ 82 N. Y. 65.

² 71 Pa. St. 11.

³ *Briggs v. Spaulding*, 141 U. S. 132.

⁴ *Witters v. Sowles*, 31 Fed. Rep. 1.

narily not liable if they have used reasonable care in appointing officers, instituting systems of reports, and investigating the things that come under their observation.⁵ They are justified in leaving the management to subordinates and they need not watch details.

As what is due care varies, therefore, with the circumstances of each case, it is impossible to formulate general rules which will cover all states of fact, but the tendency is toward a low standard except in a restricted class of cases.⁶ Inasmuch as the directors are usually stockholders and interested in the enterprise, the corporation seldom suffers because of the leniency of the law; on the other hand a harsher rule would directly injure the corporation by making desirable men unwilling to serve.

ESTOPPEL AS TO PART OF A TRANSACTION. — It is probable that estoppel by conduct, rightly termed "equitable estoppel," had its beginnings in an injunction against the pleading of facts which it would be unconscionable to assert.¹ The doctrine, as often stated, is that when one person has made assertions, which he as a reasonable man should know will be acted upon and should know are false, to another who so acts upon them that the denial of their truth would cause him loss, the former is estopped from maintaining their falsity.² The rule, however, as thus stated, needs to be applied with caution. If A has changed his position upon the faith of B's misrepresentation, B should not be permitted to withdraw his words so as to rob A of the advantage he counted upon as arising from the change.³ But unqualifiedly to estop him from proving the truth may often result in compelling him to assume losses incurred before his duty to speak the truth arose. This is to lose sight of the equitable nature of the proceeding. For example, A is bitten by a dog which B represents is his. When, however, A has brought action against him in tort he denies his ownership. A did not upon B's representation alter his relation to the original cause of action or to the actual wrongdoer, but with respect to a new matter, the costs of his suit. Hence the estoppel should go no further than to saddle B with those costs, as an injunction against pleading the truth should certainly be conditional upon their non-payment.⁴ Similar principles apply where A discounts a bill with B's name forged upon it, and after he has paid part of the proceeds is told by B that the signature is genuine. In most jurisdictions there can be no ratification of a forgery. There may, however, be an estoppel, but this should extend only to what was done under the influence of B's representations.⁵ Of course if B's representa-

⁵ *Brannin v. Loving*, 82 Ky. 370.

⁶ See *The North Hudson, etc., Ass'n v. Childs*, 82 Wis. 460.

¹ See *Horn v. Cole*, 51 N. H. 287; 2 *Pomeroy, Eq. Jurisp.* 3d ed., § 802.

² *Horn v. Cole*, *supra*; *Pickard v. Sears*, 6 Ad. & E. 469.

³ *Tobey v. Chipman*, 13 Allen (Mass.) 123; *Grissler v. Powers*, 81 N. Y. 57, distinguishing *Payne v. Burnham*, 62 N. Y. 69.

⁴ See *Eikenberry v. Edwards*, 67 Ia. 14; *Phillipsburgh Bank v. Fulmer*, 31 N. J. Law 52; *contra*, *Robb v. Shephard*, 50 Mich. 189; *Stables v. Eley*, 1. C. & P. 614, overruled in *Smith v. Bailey*, [1891] 2 Q. B. 403.

⁵ *Merrill v. Tyler*, Seld. Notes (N. Y.); *Bryce v. Clark*, 16 N. Y. Supp. 854; see *DeMoss v. Economy, etc., Co.*, 74 Mo. App. 117; *contra*, *Ewing v. Dominion Bank*, 35 Can. L. Rep. 133, criticised in 19 HARV. L. REV. 113.

tions have caused A to delay in seeking relief against the forger of the bill who has consequently escaped or parted with his property, A may recover of B the amount advanced before the representation as well as after,⁶ for here the position of A with respect to the entire matter has been altered, and the scope of the estoppel should be correspondingly widened. Some of these views, in substance, were recently expressed by the St. Louis (Mo.) Court of Appeals, which held that any liability of a principal based upon equitable estoppel, because of his failure to repudiate the contract of an agent acting beyond the scope of his authority, should extend only to such performance as took place after the duty to repudiate arose. *St. Louis Gunning Advertising Co. v. Wanamaker & Brown*, 90 S. W. Rep. 737. Some might be disposed to quarrel with the court's treatment of the vexed question of ratification by silence, but the opinion at least embodies a clearly expressed recognition of the true nature of equitable estoppel and of its proper limitations.

RECENT CASES.

ANIMALS—DAMAGE TO CHATTELS BY ANIMALS—RECOVERY FOR AS AGGRAVATION OF TRESPASS ON REALTY BY BEES.—The defendant's bees entered the plaintiff's close and therein stung to death the plaintiff's mules. The plaintiff brought trespass for the value of the mules, offering no proof of negligence. *Held*, that he cannot recover. *Petey Mfg. Co. v. Dryden*, 62 Atl. Rep. 1056 (Del. Superior Ct.).

The owner of a wild animal is commonly absolutely liable for its mischiefs. *Filburn v. Peoples Palace and Aquarium Co.*, 25 Q. B. 258. Though bees have been classified as wild animals for purposes of ownership, they are not so treated in fixing responsibility for their evil deeds. *Earl v. Van Alstine*, 8 Barb. (N.Y.) 630; *Cf. Parsons v. Manser*, 119 Iowa 88. This is reasonable, as they are no more prone to violence than many domestic animals, and their culture is too useful to be discouraged by imposing an insurer's liability. But in the principal case the bees were trespassing; and as a rule an owner is liable, irrespective of negligence, for his animals' trespasses on real property; all injury to chattels during the trespass being counted in aggravation of damage, even though the trespass itself be purely nominal. *Dolph v. Ferris*, 7 W. & S. (Pa.) 367; *cf. Van Leaven v. Lyke*, 1 N. Y. 515; *Loftus v. Ellis Iron Co.*, L. R. 10 C. P. 10. There is however, no absolute liability for the trespasses of dogs because their trespasses are not usually injurious to the realty. *Brown, Esq., v. Giles*, 1 C. & P. 118. The same rule should obviously apply to bees, and if the owner is not to be held absolutely responsible for their trespasses on realty, *a fortiori* he should not be so held for incidental damage to personalty.

BANKRUPTCY—PARTNERSHIP AND INDIVIDUAL CLAIMS AND ASSETS—ADMINISTRATION OF NON-BANKRUPT PARTNER'S ESTATE.—A partnership was adjudged bankrupt, but some partners had not participated in the act of bankruptcy, and others, being in the exempt class, could not be adjudicated bankrupts. By an order of the court all the partners were required to turn over their property to the trustee of the partnership estate, to be administered as if each had been adjudged bankrupt. *Held*, that as an incident to the administration of the partnership estate, a court of bankruptcy may administer

⁶ *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Continental Bank v. National Bank*, 50 N. Y. 575.

the individual estate of the partners. *Dickas v. Barnes*, 140 Fed. Rep. 849 (C. C. A., Sixth Circ.).

The present Bankruptcy Act marks a radical departure in treating a partnership as a legal person apart from its constituent members. Therefore a partnership may be put into bankruptcy without proceeding against the individual partners. *In re Stein*, 127 Fed. Rep. 547. Conversely, the bankruptcy of all its members does not give jurisdiction over a firm and its assets. *In re Mercur*, 116 Fed. Rep. 655. But an adoption of the mercantile conception of a partnership compels a recognition of the fact that the true relationship of the partners to the partnership is that of contributories or quasi-sureties. See 19 AM. L. REV. 32. The liability of the partners to satisfy any deficiency in meeting firm obligations is one of the assets of the firm. This is recognized in refusing to regard the firm insolvent while one of its members is solvent. *Vaccaro v. Security Bank*, 103 Fed. Rep. 436; *In re Perley & Hayes*, 138 Fed. Rep. 927. If, then, the partnership is a distinct legal entity, and the right to call upon the partners for contribution is merely a firm asset, that asset should be collected like other assets, and there is no more basis for administering the individual estates of the partners, who could not be adjudicated bankrupts, than that of a surety on an obligation to the firm. Yet the principal case finds support in previous rulings. *In re Stokes*, 106 Fed. Rep. 312; see *In re Meyer*, 98 Fed. Rep. 976. This unwarranted result indicates a failure to appreciate fully the legislative innovation in partnership law, and shows an unconscious adherence to the older law.

BANKS AND BANKING — DEPOSITS — DIRECTORS' LIABILITY FOR DEPOSITS RECEIVED AFTER KNOWN INSOLVENCY. — With knowledge of a bank's insolvency a director permitted it to receive deposits in the usual manner. The plaintiff became a surety on the bond of the bank to secure deposits of county funds, and having paid the depositing county for the loss it suffered through the insolvency, sought to recover that sum from the director. *Held*, that the director is not liable, since he is not a trustee for creditors, nor does he individually owe depositors any duty. *Hart v. Evanson*, 105 N. W. Rep. 942 (N. Dak.).

Where directors are not under a statutory liability to depositors for deposits received after knowledge of the bank's insolvency they have been held directly liable at common law. *Foster v. Bank of Abingdon*, 88 Fed. Rep. 604; *Cassidy v. Uhlmann*, 27 N. Y., App. Div., 80, 163 N. Y. 380; *Delano v. Case*, 121 Ill. 247. It is true, as this decision points out, that those cases regard directors as trustees for creditors — a position hardly tenable. *Bank v. Hill*, 148 Mo. 380. But it does not follow that the directors are therefore under no liability whatever to such depositors. An officer or director who, knowing the bank's insolvency, expressly represents it to be sound, is liable in deceit. *Giddings v. Baker*, 80 Tex. 308. Although an individual by silence as to his embarrassed condition does not ordinarily represent his solvency, it has been suggested, that since a bank is under an extraordinary duty to discontinue business upon known insolvency, for a director to permit it to operate thereafter is a representation of solvency. *Cf. St. L., etc., Ry. Co. v. Johnston*, 133 U. S. 566, 578. Again, a bank which receives deposits under such circumstances becomes a constructive trustee, *ex maleficio*, for the depositor. *Wasson v. Hawkins*, 59 Fed. Rep. 233. And it is submitted that the director who acquiesces in mingling such funds with general assets colludes in a breach of trust and should be liable to the depositor and therefore, in the principal case, to the plaintiff, who is subrogated to the depositor's rights. *Cf. United Society v. Underwood*, 9 Bush (Ky.) 609, 619.

BILLS AND NOTES — NEGOTIABILITY — "PAYABLE ABSOLUTELY." — The defendant, a joint-stock company, issued coupon bonds payable out of the assets of the association, the stockholders, however, to be free from liability upon them. *Held*, that the bonds are not non-negotiable as being payable only out of a particular fund. *Hibbs v. Brown*, 35 N. Y. L. J. 249 (N. Y., App. Div., April, 1906).

From the necessity of making negotiable paper in the highest degree an

efficient circulating medium, there follow certain formal requisites. One of them is that a negotiable instrument must be supported by the general credit of the promisor and so be payable unconditionally. *Dawkes v. De Lorane*, 3 Wils. 207. Hence an instrument "payable out of a particular fund" within the prohibition of the Negotiable Instruments Law may be said to include one resting upon anything less than the entire assets of the promisor. The assets of a corporation do not, ordinarily, at least, include any individual liability on the part of its stockholders. See *Brown v. Eastern Slate Co.*, 134 Mass. 590. A joint-stock company, on the other hand, is a modified partnership, one of the assets of which, in a sense, is usually the financial responsibility of the shareholders. Indeed, the debts of the company are their debts. See *People v. Coleman*, 133 N. Y. 279, 285. In the present case only that portion of a company's credit represented by the property employed in its business is pledged for the payment of its bonds. They would seem, therefore, to be non-negotiable. The court follows a natural tendency to treat a joint-stock company as virtually a corporation distinct from its shareholders. See *Matter of Jones*, 172 N. Y. 575.

CHATTEL MORTGAGES — RECORDING AND REGISTRY — PRIORITY OF SUBSEQUENT LIEN FOR REPAIRS OVER RECORDED CHATTEL MORTGAGE. — The mortgagor of a wagon, who was allowed to retain possession of it and to use it in his business, left it with the defendant to be repaired without the knowledge or express consent of the mortgagee. *Held*, that the lien for repairs has priority over the recorded chattel mortgage. *Ruppert v. Zang*, 62 Atl. Rep. 998 (N. J., Sup. Ct.).

A mortgagor, even though in possession, cannot encumber the chattel with a lien, apart from statute, without the consent of the mortgagee. Therefore, a recorded chattel mortgage prevails over the subsequently acquired lien of a warehouseman, agister or owner of a stallion. *Storms v. Smith*, 137 Mass. 201; see 7 HARV. L. REV. 241; *Mayfield v. Spiva*, 100 Ala. 223. But the assent of the mortgagee may be implied from the circumstances. Thus, a liveryman's lien will prevail where the mortgagee knew that the mortgagor would board the mortgaged horse in some livery stable. *Lynde v. Parker*, 155 Mass. 481. Likewise, where the possession and use of a ship or of a locomotive are allowed to the mortgagor, assent to repairs incident to the use of them is implied. *Williams v. Allsup*, 10 C. B. (N. S.) 417; *Watts v. Sweeney*, 127 Ind. 116. The right to use a wagon naturally includes the right to keep it in a state of repair fit for use. Furthermore, repairs enhance the value of the chattel as security. Under these circumstances, notwithstanding the absence of knowledge or of express consent, both reason and authority allow assent to be implied on the part of the mortgagee, which will secure to the artificer's lien priority over the mortgage. *Hammond v. Danielson*, 126 Mass. 294; *contra*, *Small v. Robinson*, 69 Me. 425.

CONFLICT OF LAWS — REMEDIES — PROCEDURE — ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS IN FOREIGN CORPORATIONS. — The plaintiff, a creditor of a Maryland trust company sued in his own behalf a stockholder for twice the par value of his stock, alleging that such liability to a creditor was imposed by a Maryland statute. Between the purchase of the defendant's stock and the date of this case, the statute was twice changed reducing the triple to double liability and making it only enforceable ratably through a bill in equity by one creditor in behalf of all. *Held*, that the plaintiff cannot recover. *Knickerbocker Trust Co. v. Iselin*, 35 N. Y. L. J. (N. Y., Ct. App., May 9, 1906).

When the defendant became a stockholder he subjected himself to an obligation, imposed by the laws of Maryland, to any creditor of the corporation and the plaintiff could then have recovered against him in this form of action in Maryland. *Cf. Miners, etc., Bank v. Snyder*, 100 Md. 57. And presumably he could have recovered in New York, on the ground that a non-penal obligation created by the laws of one state will be enforced in another if there is a suitable procedure and no public policy to the contrary. *Cf. Milliken v. Pratt*, 125 Mass. 374.

The alteration of the Maryland law, in the case of purchasers, prior to such alteration, affected only the remedy, leaving the obligation itself unchanged. *Miners, etc., Bank v. Snyder, supra*. As the remedy is exclusively a concern of the *forum* the plaintiff settling in New York should not be subject to any restrictions subsequently imposed on the remedy by the *lex loci contractus*, and should, therefore, be allowed to recover as if before the change. *De Le Vega v. Vianna*, 1 B. & A. 284. The court purports to follow a prior New York case which differs slightly in that there the local statute governing the remedy anti-dated the purchase of the shares. *Cf. Marshall v. Sherman*, 148 N. Y. 9; but see *contra, Whitman v. Oxford National Bank*, 176 U. S. 559.

CONFLICT OF LAWS — REMEDIES: RIGHT OF ACTION — SUIT BETWEEN FOREIGNERS UPON FOREIGN TORT. — In an action of deceit in an English court of law the plaintiff was a domiciled Scotchman; the cause of action arose in Scotland; and the defendants were a Scotch banking corporation, service upon which was had through its London branch; its president, a Scotchman who appeared voluntarily; and two bankrupts who had not appeared, one a resident of London and one of Scotland. *Held*, that although the court has jurisdiction, it will stay proceedings against the bank and its president on a showing that they are greatly inconvenienced by the suit's being brought in England instead of in Scotland. *Logan v. Bank of Scotland*, 94 L. T. R. 153 (Eng., Ct. App., Dec. 21, 1905).

The court relies upon Scotch cases allowing a plea of *forum non conveniens*, and upon a New York case. See *Williamson v. North-Eastern Ry. Co.*, 21 Sc. L. Rep. 421; *Collard v. Beach*, 93 N. Y. App. Div. 339. It is often said that in cases of foreign torts between foreigners courts may in their discretion decline jurisdiction. *Collard v. Beach, supra*; see *Great Western Ry. Co. v. Miller*, 19 Mich. 305. But it seems to be more in accord with the nature of a court of law that it should be bound to take cognizance of cases within its jurisdiction. *Henry v. Sargeant*, 13 N. H. 321. It has been suggested also in the United States that the right to sue upon a cause of action arising in another state, the parties being citizens of other states, is one of the privileges guaranteed by the Constitution. *Enigartner v. Illinois Steel Co.*, 94 Wis. 70; but *cf. 17 HARV. L. REV.* 54. If, as the court suggests, the English action is so vexatious as to amount to a fraud upon the defendants, the decision might be explained as an equitable defense at law. But it seems doubtful that equity would have gone so far as to enjoin such an action, although it might grant a stay if under the same circumstances there were pending a foreign suit upon the same cause. See *McHenry v. Lewis*, 22 Ch. D. 397, 405.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REVOCATION OF LICENSE TO SELL LIQUOR. — The Deputy Excise Commissioner in the exercise of his statutory authority revoked without a hearing the relator's liquor license for not complying with the building laws. The license was assignable, and on its surrender before expiration the holder could obtain a restoration of part of the license fee. *Held*, that the relator has been deprived of his property without due process of law. *People ex rel. Loughran v. Flynn*, 110 N. Y., App. Div., 279. See NOTES, p. 607.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VALIDITY OF STATUTORY REQUIREMENT FOR MAINTENANCE OF SUIT. — The defendant's charter provided that no action should be maintained against the city for personal injuries caused by snow and ice upon the streets, unless written notice of the defective highway had been given before the injury. After the passage of this act the plaintiff was injured by the existence of snow on the defendant's streets, and brought suit. No written notice of the defect had been previously given. *Held*, that this provision violates the guaranty against the deprivation of life, liberty, and property without due process of law, and is unconstitutional. *MacMullen v. City of Middletown*, 35 N. Y. L. J. 1 (N. Y., App. Div., March, 1906).

A municipal corporation is liable at common law, except in the New England

states, for injuries sustained through defects in its streets. See 2 DILLON, MUN. CORP., § 998. Statutes relieving the city of liability unless it had knowledge of the defect have been sustained, but where previous written notice of the defect is expressly required the question is new. See *McNally v. City of Cohoes*, 127 N. Y. 350. The court argues that this provision works a deprivation of substantially all legal remedy for injuries received from defective streets, since it imposes an unreasonable condition precedent on the right to maintain suit. This reasoning does not seem altogether satisfactory. It may be suggested that the statute alters the existing common law so that there is no right of action at all arising to the injured person unless the requisite notice has been previously given. The guaranty of due process of law applies only to vested rights. See COOLEY, CONST. LIM., 511. Since the anticipated continuance of the present general law is a mere expectancy, it would seem that under this interpretation of the question the plaintiff had been deprived of nothing protected by the Constitution. But see *Hanson v. Krehbill*, 75 Pac. Rep. 1041 (Kan.).

CONTRACTS — REMEDIES FOR BREACH OF CONTRACT — JUDGMENT ON INSTALLMENTS ALREADY DEFAULTED A BAR TO RECOVERY FOR REMAINDER. — The plaintiff contracted to purchase and the defendant to sell 50,000 pairs of bicycle pedals, to be delivered and paid for in installments at a price per pair. Before the time for final delivery, the defendant having delivered part of the installments and defaulted in others, the plaintiff obtained a judgment for failure to make the deliveries then due. After maturity of all installments he sued for failure to deliver the remainder. *Held*, that the former judgment is a bar. One justice dissented. *Pakas v. Hollingshead*, 184 N. Y. 211.

In consideration of the conveyance of real estate, the defendant agreed that the plaintiff should receive certain annual payments of money and goods and should have the use of two rooms upon the premises. The plaintiff in 1901 recovered a judgment for default of the annual payments already due; and in 1904, claiming subsequent breaches and repudiation of the contract, sought rescission of the contract and an accounting. *Held*, that the former judgment is not a bar. *Gall v. Gall*, 105 N. W. Rep. 953 (Wis.).

The first case affirms a judgment of the Appellate Division which was criticised in 18 HARV. L. REV. 619. See S. C. 99 N. Y., App. Div., 472. The second is in accordance with that criticism.

CORPORATIONS — DISSOLUTION — DEVOLUTION OF PERSONAL PROPERTY ON DISSOLUTION. — A corporation owning a leasehold transferred its assets to a second corporation. Payment was made for the leasehold, but by mistake no assignment was executed. The vendor company was dissolved, and later the vendee company petitioned for the appointment of a new trustee of the leasehold. *Held*, that the petition must be granted. *Re No. 9 Bomare Road*, [1906] 1 Ch. 359. See NOTES, p. 610.

CORPORATIONS — DUTIES OF DIRECTORS — DEGREE OF CARE REQUIRED TOWARDS CORPORATION. — The directors of an investment company, in good faith but under a mistake of judgment, declared dividends when the corporation was insolvent. *Held*, that they are not liable to the assignee. *Ebelthar v. German American Security Co.'s Assignee*, 91 S. W. Rep. 262 (Ky.). See NOTES, p. 613.

CORPORATIONS — FOREIGN CORPORATIONS — VALIDITY OF CONTRACTS MADE BEFORE COMPLIANCE WITH STATUTE. — A Missouri statute requires foreign corporations to comply with certain formalities before doing business in the state; imposes a fine for failure to do so; and provides that a corporation not complying cannot "maintain any suit in any of the courts of the state." The plaintiff, an Illinois corporation, entered into a contract in Missouri with the defendant without having complied with the statute. It subsequently did so, and brought action on the contract. *Held*, that the contract is void. *Tri-State, etc., Co. v. Forest Park, etc., Co.*, 90 S. W. Rep. 1020 (Mo., Sup. Ct.).

A state may impose such conditions as it sees fit on foreign corporations before allowing them to do business within its limits. See BEALE, FOREIGN CORP., §§ 116, 117. The object of the various statutes requiring compliance with certain formalities by foreign corporations is to protect persons dealing with them from imposition and to provide a convenient mode of securing jurisdiction over them. See MOR., PRIVATE CORP., § 665. Such statutes are accordingly held by the weight of authority not to make void the contracts entered into by the corporation before compliance with the statute. *State v. American Book Co.*, 69 Kan. 1; see BEALE, FOREIGN CORP., §§ 213, 214; *contra*, *Cincinnati, etc., Co. v. Rosenthal*, 55 Ill. 85. In jurisdictions taking this view suit may therefore be maintained on such contracts in the absence of express statutory prohibition. *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187. Where, however, the statute expressly forbids the maintenance of suit, the weight of authority favors the view that this merely suspends the remedy and that a subsequent compliance with the statutory provisions removes the bar to such an action. *Security, etc., Assn. v. Elbert*, 153 Ind. 198; *contra*, *Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121. And the fact that suit may be brought in the federal courts in such a case shows that the statute affects the remedy and not the right. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — RIGHT TO COMPEL DIRECTORS TO ACT. — Upon the refusal of the directors, in whom the business management of the corporation was vested, to make a transfer of certain assets in accordance with a majority vote of the stockholders, one of the majority stockholders filed a bill to compel the directors to execute the transfer. *Held*, that the directors, if agents at all, are agents of the corporate entity, and not of the majority stockholders, being by force of the contract of membership rather in the position of managing partners; and that until this contract is changed in the prescribed way a majority of the stockholders cannot compel the directors to act. *Automatic, etc., Co. v. Cunningham*, 22 T. L. R. 378 (Eng., C. A., March 22, 1906).

This seems to be the first English decision upon this important question; and the American authority upon the point consists of *dicta*, analogies, and statements in text-books. The object of giving the corporate management to a board of directors is to have the business affairs controlled by their judgment. There must be action by the directors as such to make an act within their powers that of the corporation; a vote of the stockholders is insufficient. *Gashwiler v. Willis*, 33 Cal. 11. The power given directors is exclusive in its nature, and the stockholders cannot compel them to act contrary to their judgment. See *McCullough v. Moss*, 5 Den. (N. Y.) 567. A majority of the stockholders cannot prevent an act by the board of directors within its proper powers. *Hutchinson v. Green*, 91 Mo. 367; see THOMPSON, CORP., § 3968, § 5314. These holdings seem to be inconsistent with the idea that the directors are agents of the stockholders, for, if agents, their action could be compelled, restrained, or directed by their principals. So, too, if agents of the stockholders, the power of control would really vest the management in the stockholders and defeat the object of having directors.

CORPORATIONS — ULTRA VIRES CONTRACTS — DOUBLE LIABILITY ON SHARES HELD ULTRA VIRES. — A national bank purchased corporation shares *ultra vires*. *Held*, that it cannot be charged with double liability thereupon. *First National Bank v. Converse*, U. S. Sup. Ct., Feb. 19, 1906. See NOTES, p. 609.

CRIMINAL LAW — SPECIFIC INTENT — CRIMINAL RESPONSIBILITY OF DIRECTORS FOR ULTRA VIRES APPLICATION OF FUNDS. — The vice-president of the New York Life Insurance Co., who was also a member of the finance committee, having consented to an *ultra vires* application of the funds of the company, was arrested for statutory larceny. *Habeas corpus* proceedings to the warrant were instituted. *Held*, that enough evidence is disclosed to justify

the magistrate in issuing a warrant and allowing a jury to decide whether the money was applied with the requisite criminal intent. *People ex rel. Perkins v. Reardon*, 35 N. Y. L. J. 226 (N. Y. Sup. Ct. April 19, 1906). See NOTES, p. 611.

DEEDS — DELIVERY, ACKNOWLEDGMENT AND ACCEPTANCE — PRESUMPTION OF ACCEPTANCE. — An owner of land duly executed a deed running to his wife, and handed it to a third party to have it recorded, intending thereby to effect a delivery. The wife did not know of the existence of the deed till after the grantor's death, when she accepted it. *Held*, that title vests in the wife at the time of the delivery. *Russell v. May*, 90 S. W. Rep. 617 (Ark.). See NOTES, p. 612.

DEEDS — DELIVERY — DELIVERY TO THIRD PERSON TO BE DELIVERED UPON GRANTOR'S DEATH. — A executed a deed to the plaintiff and delivered it to X to be delivered to the plaintiff upon A's death. Subsequently, A delivered another deed of the same land to the defendant, who knew all the facts. The defendant's deed was first recorded, and both deeds were gratuitous. *Held*, that the plaintiff may obtain a decree for the cancellation of the deed to the defendant. *Grilley v. Atkins*, 62 Atl. Rep. 337 (Conn.).

The modern tendency of courts has been toward making the title of land, analogously to personal property, pass by deed at the moment when the grantor intends the transaction to be consummated. See *Bogie v. Bogie*, 35 Wis. 659, 667. Accordingly, on the facts of the principal case, though the first grantee is generally protected on some principle or other, yet many courts hold that the title does not pass to the grantee until the grantor's death. *Stone v. Duvall*, 77 Ill. 475; see 18 HARV. L. REV. 138. Under the old common law, the title to land passed with the actual delivery of the deed. See COMYNS DIG., 5th ed., 262. When the deed was handed to a stranger to be redelivered to the grantee, title passed either on the first or on the second delivery. See COMYNS DIG., 263, 264. Thus, in the case of escrows, title was transferred only on the second delivery; but where the second delivery depended on an event sure to happen, the deed was generally held to be the grantee's from the first delivery. See SHEP. TOUCH., 7th ed., 58; *Wheelwright v. Wheelwright*, 2 Mass. 447. These principles, which the Connecticut court reaffirms in reaching its decision, seem decidedly preferable to the modern hybrid doctrine mentioned above, produced by an unnatural combination of the elements of real and personal property law.

DIVORCE — ALIMONY — WHEN WIFE IS UNABLE TO OBTAIN DIVORCE ON ACCOUNT OF HER OWN MISCONDUCT. — A prior action for divorce having been dismissed because of the adultery of both husband and wife, the wife, being abandoned by her husband, brought a suit for separation. *Held*, that a decree ordering the husband to pay a certain sum of money to the wife be affirmed. *Hawkins v. Hawkins*, 110 N. Y. App. Div. 42.

Apparently the question whether the wife could obtain a judicial separation was not before the court, but the headnote of the case intimates that separation was decreed in the lower court. Since the adultery of the petitioner is a good defence to an action for absolute divorce, a decree of separation would seem to be opposed to the general view which makes no distinction between actions for absolute divorce and for separation as to the effectiveness of a recriminatory defence. *Lempriere v. Lempriere*, L. R. 1 P. & D. 569; 2 BISHOP, MAR., DIV., & SEP., 1st ed., § 365; N. Y. CODE, § 1765. But as the majority of jurisdictions allow an abandoned wife, either at common law or by statute, to maintain a bill for support or alimony, apart from any action or decree for divorce, and as a provision of the New York Code apparently effects the same result, the actual decision in the case is not open to the same objection as the decree for separation. 2 AM. & ENG. ENCYC., 2d ed., 94, 95; N. Y. CODE, § 1766; but see *Waring v. Waring*, 100 N. Y. 570. Though no decision exactly in point has been found, it seems highly desirable, as a matter of public policy, to allow

a wife, whom the law does not permit to be abandoned, to maintain against her husband a bill for her support, even if her guilt bars her from securing any form of divorce. *Cf. Bascom v. Bascom*, Wright (Oh.) 632.

DOWER — WHETHER BARRED BY VOID DIVORCE. — A wife, domiciled in New York, procured a divorce in Kansas which was invalid by the law of New York. On the death of her former husband she brought action for dower. *Held*, that having submitted to the jurisdiction of the Kansas court she cannot now question its decree of divorce, and is therefore barred of her right of dower. *Voke v. Platt*, 96 N. Y. Supp. 725.

A valid decree of divorce in the absence of statute will bar the wife's right to dower. *Pullen v. Pullen*, 52 N. J. Eq. 9; see 2 BISHOP, MAR., DIV., & SEP., §§ 1632-1640. This result follows whether the divorce be decreed by a domestic or foreign tribunal. *Hood v. Hood*, 110 Mass. 463. But where the divorce is void the marriage relation still subsists, and the wife's right to dower is therefore unaffected. *Cheely v. Clayton*, 110 U. S. 701. Where, however, the wife has removed to a foreign jurisdiction and obtained a decree for divorce, it is doubtful whether she can be heard to say that the decree is void and that she is entitled to her dower. The essential elements of an estoppel are obviously lacking. *Todd v. Kerr*, 42 Barb. (N. Y.) 317; *Holmes v. Holmes*, 4 Lans. (N. Y.) 388. Upon the principle, however, that where a party has invoked the jurisdiction of a court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction, it is held that the wife's claim is barred. *Starbuck v. Starbuck*, 173 N. Y. 503; *Ellis v. White*, 61 Ia 644. Whether this extension of the doctrine of estoppel has yet become generally recognized as law may perhaps be doubted. That it will ultimately be so recognized seems probable from the tendency of the decisions.

ESTOPPEL — ESTOPPEL IN PAIS — PART OF A TRANSACTION. — An agent made a contract with A which was alleged to have been beyond the scope of his authority. After A had performed a portion of the contract he notified the principal, who failed to repudiate the agreement until performance had been completed. *Held*, that the principal's silence may go to the jury as evidence of intentional ratification, but that any liability based upon equitable estoppel must apply only to the performance subsequent to the day the principal was notified. *St. Louis Gunning Advertising Co. v. Wanamaker & Brown*, 90 S. W. Rep. 737 (Mo., St. Louis Ct. App.). See NOTES p. 614.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CUSTOM AS EVIDENCE OF NEGLIGENCE. — The plaintiff, a cable splicer employed by the defendant company, while working on a telephone pole received a shock which threw him to the ground. *Held*, that the test of the company's negligence in its overhead construction is whether it used the care ordinarily exercised by other companies in the same business. *Law v. Central, etc., Telegraph Co.*, 140 Fed. Rep. 558 (Circ. Ct., W. D., Pa.).

A servant of the defendant telephone company, while at work on top of a pole, failed to catch a tool which another servant threw up to him. In its fall the tool injured a pedestrian. *Held*, that as tending to show negligence, evidence that it was customary to haul tools up by a line is admissible. *Brunke v. Missouri & K. Telephone Co.*, 90 S. W. Rep. 753 (Mo., Kansas City Ct. App.).

The first case, though supported by some authority, seems clearly indefensible on principle. The court sweeps away the distinction between a rule of evidence and a rule of substantive law. The care exercised by the ordinary prudent man under the circumstances is the fixed standard. What care other men, engaged in the same business, have been accustomed to use may be greater or less than that of the ordinary prudent man; and therefore, to show that a company acted in a particular matter as other companies are accustomed to do, does not show conclusively that that company was not negligent. *Maynard v. Buck*, 100 Mass.

40. But the care customarily employed by others is undoubtedly of strong probative value in determining what is due care under the circumstances. Accordingly, as a theoretical matter, the second case correctly admitted it as evidence. See 1 WIGMORE, EV., § 461. Practically, however, a jury is very likely to accept the customary conduct of others, not as evidence merely, but as the standard of care itself, and then to test the defendant's conduct by that standard. Because of this strong tendency to mislead, perhaps the best rule would be to exclude such evidence altogether. See 14 HARV. L. REV. 156.

FEDERAL COURTS — JURISDICTION AND POWERS — WHAT LAW GOVERNS CONTROVERSIES BETWEEN STATES. — The State of Missouri filed a bill in the Supreme Court of the United States for an injunction restraining the State of Illinois from using the Chicago Drainage Canal to discharge the sewage of the city of Chicago into the Mississippi River by way of the Illinois River, on the ground that the pollution thus caused was a nuisance. *Held*, that there is no evidence of sufficient pollution to constitute a common law nuisance; *semble*, that the plaintiff in such a suit must prove sufficient pollution to constitute a *casus belli* between independent nations. *State of Missouri v. State of Illinois, etc.*, 200 U. S. 496. See NOTES, p. 606.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — RIGHT OF REMOVAL. — To an indictment for murdering Governor Goebel, the defendant pleaded a pardon duly executed by Governor Taylor. The pardon was held void by the highest court of Kentucky on each of three successive appeals. The defendant thereupon petitioned the federal court for a removal of the cause under a federal statute providing that a cause may be removed to the federal courts when any criminal suit is brought in a state court against a person who cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the equal civil rights of citizens of the United States. *Held*, that whether or not the defendant would be denied such federal rights by the action of the state court, the case is not removable to the federal court, since he is not being deprived of his rights by the state laws or constitution. *Kentucky v. Powers*, 26 Sup. Ct. Rep. 387.

It is commonly stated that the removal statute applies primarily, if not exclusively, to a denial of federal rights by the constitution or laws of the state. See *Virginia v. Rives*, 100 U. S. 313, 319. In the present case the court construed the word "laws" as used in these *dicta* to mean "statutes." Such a construction is not justified by the natural meaning of the word or by the premise upon which the *dicta* are founded. The theory underlying the rule is that in order to remove a cause the accused must show a certainty of being denied a federal right, and that he cannot establish this unless there be a law which the state court will presumably follow, denying him such a right. This reason not only fails to support the present decision, but it points to the opposite result, for under the doctrine of *stare decisis* the Kentucky court would certainly follow its prior decisions denying the validity of this pardon.

HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — SEPARATION AGREEMENTS. — A husband and wife already living apart entered into an agreement whereby the husband promised to provide the wife with a certain income for the support of herself and children. *Held*, that the contract is enforceable, although made directly with the wife without the intervention of a trustee. *Effray v. Effray*, 97 N. Y. Supp. 286.

In holding that such a contract is not void as against public policy, the decision accords with both the English and American law. Allowing the agreement to be made directly with the wife without the intervention of a trustee is in harmony with the modern tendency to remove the disabilities of married women. For a discussion of the principles involved, see 15 HARV. L. REV. 147.

INFANTS — UNBORN CHILDREN — WHEN CHILD EN VENTRE SA MÈRE CONSIDERED BORN. — A will gave estates tail successively to the sons of a living person, with a proviso that any son born during the testator's lifetime should not take a larger interest than an estate for life. *Held*, that a son *en ventre sa mère* at the testator's death and subsequently born alive takes a life estate only. *Villar v. Gilbey*, 22 T. L. R. 347 (Eng., C. A., March 8, 1906).

The rule was early laid down that an infant *en ventre sa mère* would be regarded as born if it were for his benefit. *Doe d. Clarke v. Clarke*, 2 H. Bl. 399. But the English court formerly refused to apply this rule if the child's interest would be injured thereby. *Blasson v. Blasson*, 2 De G. J. & S. 665. Recent English decisions make a considerable extension, applying the rule when considering the infant as born will benefit its parent and not injure the infant. *In re Burrows*, [1895] 2 Ch. 497. Further, it is held that for the purposes of the Rule against Perpetuities, a child *en ventre sa mère* will be regarded as a life in being even though it is prejudiced by being considered as born. *In re Wilmer's Trusts*, [1903] 1 Ch. 874, [1903] 2 Ch. 411. The proviso in the principal case was expressly confined to children "born," and it is a fiction so to regard an infant *en ventre sa mère*. The result is that the infant takes a life estate instead of an estate tail. The present decision virtually abrogates the doctrine of *Blasson v. Blasson*, and radically changes the English law. In only one of the cases cited by the court was the infant prejudiced by the fiction. *Cf. In re Wilmer's Trusts*, *supra*. That decision, however, finds explanation in the arbitrary nature of the Rule against Perpetuities, which regards the period of gestation, when gestation actually exists, as a term in gross. See GRAY, RULE AGAINST PERP., 2d ed., §§ 220-222.

INSURANCE — AMOUNT OF RECOVERY — EFFECT OF OTHER INSURANCE: PRO RATA CLAUSE. — A partner insured for \$4,000 his two-thirds interest in firm property worth \$4,090.53. The firm also insured its property for \$1500 by a policy containing a *pro rata* clause. A fire damaged the property and the partner recovered \$733.12 upon his personal insurance. The firm subsequently sued upon its policy. *Held*, that since the partner's risk and interest are not the same as those of the partnership the policies are not to be pro-rated. *Yanko & Levitas v. Standard Fire Ins. Co.*, 23 Lanc. L. Rev. 163 (Pa., Super. Ct., Lanc. Co., March 12, 1906).

A *pro rata* clause, providing that the insured shall not recover on the policy a greater proportion of his loss than the amount thereby insured bears to the whole amount of insurance on the property, operates only so far as the same property, risk and interest are insured. The conclusion that the interests of the partner and of the firm are different is reached by viewing a partnership as a legal entity. But under the more generally accepted theory the interest of a firm in its property seems to be precisely the sum of the interests of all the partners. See LINDLEY, PARTNERSHIP, 7th ed., 128, 360. This is not altered by the fact that the partnership relation renders it impossible for any member to convey away his separate title to firm property. See *Sindelare v. Walker*, 137 Ill. 43. As to any partner's portion of the property right the interest of the firm coincides with the interest of such partner, and with respect to the coincident insurance it would seem that the companies should prorate. Pennsylvania, however, holds that where property is only in part the same there is no double insurance within the meaning of the *pro rata* clause. *Meigs v. Insurance Co. of No. Am.*, 205 Pa. St. 378. This rule appears to govern the principal case. The contrary doctrine upheld in New York is preferable. See *Ogden v. East River Ins. Co.*, 50 N.Y. 388.

INTERNATIONAL LAW — CHANGE OF SOVEREIGNTY — EXISTING LAWS IN PORTO RICO — EFFECT OF ANNEXATION THEREON. — The Foraker Act established a United States District Court of Porto Rico, and provided that the laws and ordinances of Porto Rico then in force should, with certain limitations, continue unchanged. After the passage of this Act, the virtual plaintiff below brought a common law action of trespass on the case, which action was not

only unknown to the civil code of Porto Rico, but was absolutely in conflict with the remedies therein provided. *Held*, that as the code provides for such a case, the proceedings below were null and void. Two justices dissented. *Perez v. Fernandez*, U. S. Sup. Ct., April 23, 1906.

Though this decision is of important practical significance in the administration of our new insular possessions, it is simply an application of the established doctrine that the laws of a legal unit remain substantially unaffected by conquest or change of sovereignty. See, generally, 11 HARV. L. REV. 343; 15 *ibid.* 220; 19 *ibid.* 131.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — LIBEL PER SE — The declaration charged that the defendant maliciously and falsely published concerning the plaintiff, [then a candidate for a minor office in the Republican party], an article containing statements that plaintiff "is absolutely devoid of any knowledge of the customs of polite men . . . devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party . . . apparently knows no more and cares no more for political principles than he does of the Silurian age in geology. . . ." To this declaration the defendant demurred. *Held*, that the article is not libelous *per se*, and in the absence of an allegation of special damage does not set forth a cause of action. *Duffy v. New York Evening Post*, 109 N. Y. App. Div. 471.

It is difficult to support this decision. Although there is some confusion in the authorities as to the exact limitations of "fair comment" on public characters, it is universally admitted that it never protects false statements of fact. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 242. The phrase "libelous *per se*" is used in two senses: first, referring to matter which is libelous on its face, aside from collateral circumstances, and second, referring to matter which is libelous without the allegation of special damage. *Walker v. Tribune Co.*, 29 Fed. Rep. 827. The second signification is most commonly illustrated in cases of slander and it has been disputed whether it is applicable to libel at all. ODGERS, LIBEL AND SLANDER, 4th ed., 353. The present pleadings show a libel *per se*, it is believed, whichever use of the phrase is adopted, for the statements set forth in the declaration charge the commission of acts amounting to party treason, and the demurrer admits their publication. *Hamilton v. Eno*, 81 N. Y. 116; *Ulrich v. New York Press Co.*, 50 N. Y. Supp. 788 (Sup. Ct.).

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — DESTRUCTION OF ILLEGALLY USED FISH-NETS WITHOUT JUDICIAL PROCESS. — An officer in pursuance of a state statute had without judicial process seized, and was about to sell, illegally used fish-nets. *Held*, that the owner cannot recover the nets, as the statute is constitutional. Two justices dissented. *Daniels v. Homer*, 139 N. C. 219.

The United States Supreme Court has held that a statute providing for the destruction of fish-nets illegally used without a hearing was constitutional, notwithstanding the Fourteenth Amendment. *Lawton v. Steele*, 152 U. S. 133; S. C., 119 N. Y. 226. The weight of authority seems, on the whole, to support such a decision, and it may well, on principle, be justified under the police power as an emergency means of abating a nuisance. In the present case, however, by allowing a sale after removal, the court makes an advance wrong in theory and contrary to the authorities. A statute essentially the same has been held unconstitutional. *Edson v. Crangle*, 62 Oh. St. 49. So also a statute providing for the sale without hearing of a trespassing ship was held unconstitutional. *Colan v. Lisk*, 135 N. Y. 188. This may perhaps be distinguished by the far greater value of the subject matter. But as the value of the fish-net in the principal case was \$60, the same answer cannot be made to those cases holding unconstitutional similar statutes providing for the sale of a tortfeasor's horse or gun or of vagrant cows. *Dunn v. Burleigh*, 62 Me. 24; *McCounsell v. McKillip*, 65 L. R. A. 610 (Neb.); *Rockwell v. Waring*, 35 N. Y. 302.

PUBLIC OFFICERS—TERM OF OFFICE—POWER OF LEGISLATURE TO EXTEND TERM.—A statute which created the office to which an incumbent had been elected, required the election of a successor in 1905. A later statute, passed during incumbency, provided that the election should take place in 1906. *Held*, that this extension of the term is unconstitutional. *State ex rel. Hensley v. Plasters*, 105 N. W. Rep. 1092 (Neb.).

Where the constitution itself creates the office and expressly fixes or limits the term, the legislature is powerless to extend the term directly or indirectly. *State ex rel. Attorney-General v. Brewster*, 44 Oh. St. 589. But where the office and the term are the creatures of the legislature, there is abundant authority that the legislature has power to make reasonable alterations in the date of an election or of the beginning of a term, though incidentally the term of an incumbent is lengthened thereby. *Common Council v. Schmid*, 128 Mich. 379. To these two main propositions are attached several corollaries. Thus, a constitutional provision that no officer shall hold for a longer term than that for which he was elected does not prevent the incidental extension of a term where the constitution and the statute under which the officer was elected provide that he shall hold office till his successor is elected and qualifies. *State ex rel. Meredith v. Tallman*, 24 Wash. 426; *cf. Gemmer v. State ex rel. Stephens*, 163 Ind. 150. Yet if the constitution creates the office and requires the legislature to fix the term, an extension thereof is held improper. *People ex rel. Fowler v. Bull*, 46 N. Y. 57. The principal case may be supported on the ground that the respondent felt obliged to admit that the statute in question was passed solely for the purpose of extending the term of office. Such a statute is void. *State ex rel. Hamilton v. Krez*, 88 Wis. 135; but see *Christy v. Board of Supervisors*, 39 Cal. 3.

RIGHT TO SUPPORT—REMOVAL OF SUPPORT—RIGHT OF UPPER OWNER AGAINST LOWER OWNER IN BUILDING.—The plaintiff and the defendant executed an agreement under which the plaintiff erected a second story over the defendant's one-story building. The walls of the defendant's tenement, the lower story, having fallen into decay, the plaintiff, as owner of the upper story, brought this bill to compel the defendant to repair the walls of his tenement so as to afford the plaintiff's structure sufficient support. *Held*, that the defendant is under no obligation to repair the walls. *Jackson v. Bruns*, 106 N. W. Rep. 1 (Ia.).

The exact nature of the agreement does not appear, but it may be assumed that it took the form of a grant. This would give the plaintiff an estate; and there would be, if not an express, an implied grant of an easement of support. *Cf. Rhodes, Pegram & Co. v. McCormick*, 4 Ia. 368; *McConnel v. Kibbe*, 33 Ill. 175. The question whether this easement imposes on the lower owner any duty beyond the passive duty of non-interference with the walls arises here for practically the first time. Apparently the only decision on the point is a very old case holding the lower owner to the active duty of repair, — a case that was considered doubtful at the time, and was later expressly disapproved of. *Keilw.* 98 b. pl. 4; *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093. Moreover, in the analogous case of easements of lateral support it seems clear that there is no active duty to repair. *Pierce v. Dyer*, 109 Mass. 374. It is the general rule that there is no active duty upon the servient owner. *Cf. Pomfret v. Ricroft*, 1 Saund. 321. But the plaintiff would probably be given the right to enter upon the lower tenement and make repairs himself, as a right necessary to the enjoyment of his easement of support. *Cf. GALE, EASEMENTS*, 7th ed., 461.

RIGHT OF SUPPORT—REMOVAL OF SUPPORT—WAIVER OF RIGHT TO SUPPORT FROM SUBJACENT ESTATE.—The plaintiff conveyed the coal under part of his farm to the defendant's predecessor in title, "together with the right to enter upon and under said land, and to mine, excavate, and remove all of said coal." The defendant removed literally all the coal, thereby causing the plaintiff's land to subside. *Held*, that the defendant is not bound to furnish support for the plaintiff's land. *Griffin v. Fairmont Coal Co.*, 53 S. E. Rep. 24 (W. Va.).

That the horizontal severance of land into distinct estates leaves the surface owner the right to support from below is well established. See *BAR-RINGER & ADAMS, LAW OF MINES*, 1st ed., 675-686. The court professed a full recognition of this principle, but found in the plaintiff's grant a waiver of this common law right. While such a waiver may be made, the courts strongly insist that it be clearly expressed. *Williams v. Hay*, 120 Pa. St. 485; see also *LINDLEY ON MINES*, § 821. The stipulation that the grantee should have the right to remove *all* the coal, upon which the court apparently relied in this case, has been repeatedly held not to deprive the grantor of his right to support. *Burgner v. Humphrey*, 41 Oh. St. 340; *Carlin v. Chappel*, 101 Pa. St. 348. Such stipulations seem to be typical of conveyances of this nature, and are scarcely more than express grants of the right of user, which the law itself would imply as a legal attribute to ownership in all the coal, subject, however, to the surface owner's right of support. As stated in the vigorous dissenting opinion, the decision seems to make an inroad upon well-established law, and issuing from a jurisdiction of extensive coal interests, its influence cannot be considered negligible.

SALES—RIGHTS AND REMEDIES OF BUYERS—WHETHER BILL OF SALE VOID UNDER STATUTE IS MADE ENFORCEABLE BY ESTOPPEL.—A bill of sale, not stating the consideration as required by statute, was given by the defendant to the plaintiffs. Both parties held it out as valid to third persons. It was not proved that the plaintiffs knew that the bill of sale violated the statute, and they had, apparently relying on its validity, incurred expense in consequence. *Held*, that the bill of sale is void, but that the defendant cannot, as against the plaintiffs, now be heard to say this. *Comitti v. Maher*, 94 L. T. R. 158 (Eng., Ch. D., Dec. 5, 1905).

If the bill of sale was, as the court indicates, absolutely void under the statute, it is difficult to see how an estoppel can make it enforceable. For a discussion of the principles involved, see 19 *HARV. L. REV.* 454.

TAXATION—PARTICULAR FORMS OF TAXATION—NEW YORK STOCK TRANSFER TAX.—A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries, or transfers of shares or certificates of stock in any domestic or foreign corporation . . . on each one hundred dollars of face value or fraction thereof." a tax of two cents. *Held*, that the tax is constitutional. *People ex rel. Hatch v. Reardon*, 35 N. Y. L. J. 419 (N. Y., Ct. App., April 17, 1906).

This case affirms the decision of the Appellate Division discussed in 19 *HARV. L. REV.* 460.

TAXATION—PROPERTY SUBJECT TO TAXATION—PROCEEDS OF IMPORTED GOODS, SOLD IN ORIGINAL PACKAGES.—A foreign corporation imported goods into New York, where they were sold in the original packages by its local agent. Promissory notes given in payment were held by the agent for collection at maturity, when the proceeds, less the expenses of the local business, were to be remitted to the foreign office. *Held*, that the notes are subject to state taxation. *People ex rel. Burke v. Wells*, 184 N. Y. 275.

While the decisions are not harmonious, a substantial body of authority holds with the present case that promissory notes owned by non-residents are taxable in the hands of resident agents. *New Orleans v. Stempel*, 175 U. S. 309; see 13 *HARV. L. REV.* 680. The case, however, presents the further question whether notes which represent the proceeds of non-taxable imports are subject to taxation. The well-established rule that gross receipts of interstate commerce are not taxable would seem to be conclusive that proceeds of imports cannot be taxed as such. *Cf. Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326. So soon, however, as such proceeds could be said to be mingled with the mass of state property, they would become taxable as such, and the question of their source would be immaterial. *Waring v. The Mayor*, 8 Wall. (U. S.) 110; *Hibernia, etc., Society v. San Francisco*, 26 Sup. Ct. Rep. 265. Had

the notes in question been received by the local agent for immediate remittance to the foreign office they would have been free from taxation as property *in transitu*. Cf. *Kelley v. Rhoads*, 188 U. S. 1. Since, however, they were to be held till maturity and to be used in part as capital in the local business, they would seem to have become incorporated with the mass of state property, and therefore subject to the tax imposed.

TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — NAME REPRESENTING FICTION CREATED FOR BUSINESS PURPOSES. — The plaintiffs manufactured two varieties of candy known by specific names, and sold them purporting to act as "Sole Selling Agents for the Climax Confection Company." Subsequently, by a mere coincidence, the defendants, acting in the utmost good faith and caution, adopted the same name as their sole business name. *Held*, that the plaintiffs did not so adopt and use the name "Climax Confection Company" as to entitle them to protection against the defendants' use of it. *Shoemaker v. Ulmer*, 63 Leg. Int. 128 (Pa., C. P. No. 3, Phila. Co.).

It is now well established that business and trade names, under proper circumstances, will be protected against such use of them by another as injures the property right of good will in a business. See 10 HARV. L. REV. 280, 286-295. Yet in this class of cases, the courts have rigorously applied the equitable principle that the plaintiff must commend himself to the court in order to obtain its aid. Thus a plaintiff who is conducting an illegal business, or selling a misrepresented article, or who has adopted a deceptive name, will not be assisted. *Portsmouth Brewing Co. v. Portsmouth Brewing, etc., Co.*, 67 N. H. 433; see *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, 574; 6 COLUMBIA L. REV. 248. Similarly, from reasons of public policy, courts have generally been reluctant to protect common generic and descriptive names, or names having an undue tendency to hinder competition. See *Canal Company v. Clark*, 13 Wall. (U. S.) 311, 323. In the present case there is no reason why the court could not have protected the plaintiffs' use of the name in question, although it stood for no business nor article but merely for an imaginary company. But as the granting of relief is eminently a matter for the court's discretion, it might well refuse to encourage such business fictions by furnishing protection to names applied thereto.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PRIVITY BETWEEN CONCURRENT ADMINISTRATORS OF THE SAME DECEASED. — A writer in a recent periodical maintains that a judgment for the defendant in an action by an administrator should bind another administrator of the same deceased in another jurisdiction, because there exists between the two an "official privity." *The Relation to each other of different Administrators of the same Deceased*, by Thaddeus D. Kenneson, 6 Columbia L. Rev. 15 (January, 1906). This result Mr. Kenneson reaches in two ways. Administrator A, he says, is, in the eye of the law, the "embodiment" of the deceased. As much may be said for administrator B. A judgment against A is in effect one against the deceased, and a judgment against the deceased should conclude B. Again, both A and B represent the same group of creditors. Since a judgment against A binds the creditors it should be equally effective against their other representative.

Leaving aside for the moment the intrinsic merits of Mr. Kenneson's position, one may explain upon other grounds most of the cases which he cites to uphold it. That a sovereign has power to deal with chattels with-

in its territory is an undoubted principle of the Conflict of Laws. It follows that upon the death of an intestate there fall to each jurisdiction, to be administered as a separate and distinct estate, the tangible assets of the deceased found within its borders. 1 WOERNER, ADMIN., 359 *et seq.* Over these assets the court's power is exclusive and absolute, and, irrespective of privity, foreign tribunals will refuse to review its disposition of them even though it labored under an error as to certain material facts. See *Holcomb v. Phelps*, 16 Conn. 126. As a simple debt is an intangible and floating asset, without situs, payment may be compelled by the first administrator who can fasten upon the debtor within his jurisdiction. Once an administrator has received payment and so reduced the claim to possession, the obligation is discharged as against the world. See *Wilkins v. Ellett*, 108 U. S. 256. There have even been cases to the effect that a mere judgment without satisfaction merges the debt and stamps it with the plaintiff's name so as to remove it from the power of other administrators. See *Biddle v. Wilkins*, 1 Pet. (U. S.) 686. But a judgment against an administrator-plaintiff, which is the case Mr. Kenneson puts, is plainly not the taking possession of an asset but a holding that there is no asset to which he or his privies are entitled.

Upon the theory, assumed by the writer, that each personal representative continues the *personam* of the deceased, privity may perhaps be worked out and a somewhat desirable result be reached. But the modern tendency is away from the fiction suggested and towards considering a so-called "personal representative" merely as an appointee of the court, perhaps nominated by the testator, but deriving his estate and authority from the court in which they were vested. See *Byers v. McAuley*, 149 U. S. 618, 618. There can be no privity of appointment between these appointees of independent jurisdictions such as may be found between successive administrators in the same state. The estates are as distinct as are several receiverships of the same corporation. From the mere fact that these estates once comprised the property of one person can arise no privity between the appointees. See *Taylor v. Barron*, 35 N. H. 484. Nor can the fact that each jurisdiction gives to any creditor a right to bring suit against its administrator be more effectual until the claim has been satisfied. Considering the jealousy with which courts are apt to guard the interest of creditors and other claimants who appeal to them, it may be long before they bind their agents by the carelessness or the possibly collusive conduct of foreign administrators, through recourse to Mr. Kenneson's reasoning. See *Brodie v. Bickley*, 2 Rawle (Pa.) 431, 437; *Low v. Bartlett*, 8 Allen (Mass.) 259, 264. But see *Goodall v. Marshall*, 14 N. H. 161.

It must be admitted that the authority upon the precise case Mr. Kenneson discusses is meager. But it is not easy to distinguish the mass of cases in which an administrator was plaintiff by classing these, as the writer does, with *in rem* proceedings. Although they involve the question of the existence of assets to meet the plaintiff's claim the decree is generally said to be in substance and in form against the defendant personally. See *Stacy v. Thrasher*, 6 How. (U. S.) 44, 60. It would seem, therefore, that the finding that the plaintiff was a creditor of the deceased should bind parties and privies in subsequent litigation. Following Mr. Kenneson's argument other administrators are privies. Yet the decisions declare that there is no privity and that no other administrator is affected by the previous adjudication.

ABUSE OF PERSONAL INJURY LITIGATION. Clarence A. Lightner, R. B. Newcomb, Roy O. West, Percy Werner, Oria B. Taylor, Howard Bryant, J. L. Quackenbush, Russell Duane. 18 Green Bag 193.

AMERICAN VERSUS BRITISH ECCLESIASTICAL LAW. Epaphroditus Peck. Discussing the Free Church of Scotland case. See 18 HARV. L. REV. 310; 6 Columbia L. Rev. 137. 15 Yale L. J. 255.

BILL OF LADING AS COLLATERAL SECURITY. Thomas B. Paton. Giving the provisions of the bill introduced into Congress and the arguments of counsel in favor thereof. 23 Banking L. J. 187.

- BLACKMAIL AND EXTORTION. II. *James W. Osborne*. The second in a series of articles treating the subject largely with reference to New York law. 4 Bench & Bar 90.
- CAN A COURT OF EQUITY CIRCUMVENT THE LAW? *Joseph M. Sullivan*. 68 Alb. L. J. 37.
- COMPENSATION OF MEDICAL WITNESSES, THE. *H. B. Hutchins*. 4 Mich. L. Rev. 413.
- CONSPIRACY TO COMMIT ACTS NOT CRIMINAL PER SE. *Amasa M. Eaton*. Arguing that as a matter of common law and reason a combination to do an act which by itself is not criminal is not an unlawful conspiracy. 6 Columbia L. Rev. 215.
- DARTMOUTH COLLEGE PARALOGISM, THE. *William Trickett*. 4 Am. L. Rev. 175.
- DEMAND ON PRINCIPAL BEFORE ACTION AGAINST GUARANTOR. *William P. Rogers*. 6 Columbia L. Rev. 229.
- DEVELOPMENT OF INTERNATIONAL LAW. III. *Edwin Maxey*. 40 Am. L. Rev. 188.
- EMANCIPATION AND CITIZENSHIP. *Gordon E. Sherman*. Discussing and deprecating the conception of a status between those of slavery and citizenship. 15 Yale L. J. 263.
- EMPLOYERS' LIABILITY, AS AN INDUSTRIAL PROBLEM. *Roger S. Warner*. 18 Green Bag 185.
- GROWING COMPLEXITIES OF LEGISLATION, THE. *Don E. Mowry*. 40 Am. L. Rev. 212.
- GROWING CONCEPTION OF NEUTRALITY. *Hannus Taylor*. A brief consideration of the modern development of the rights and duties of neutrals in regard to the enemies' warships. 40 Am. L. Rev. 252.
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- IS A PARTY TO AN ACTION IMMUNE FROM SERVICE OF CIVIL PROCESS WHILE ATTENDING COURT IN A STATE OTHER THAN THAT OF HIS RESIDENCE? *Sumner Kenner*. Reviewing the conflicting decisions and maintaining that this question must be answered affirmatively. 62 Cent. L. J. 280.
- JUDGES IN EUROPE. *Anon*. Explaining the different methods of selecting judges in England, on the Continent, and in the United States, with a comparison to the advantage of England. 29 N. J. L. J. 113.
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- LAW OF OFFICERS, THE. *Leonhard Felix Fuld*. Remarking upon the exceptions to the strict doctrine of separation of powers of judicial, executive, and administrative officers. See 19 HARV. L. REV. 203. 14 L. Stud. Helper 71.
- MONEY BORROWED BY AGENT WITHOUT AUTHORITY. *Anon*. 50 Sol. J. 340.
- MORAL PERSONALITY AND LEGAL PERSONALITY. (Contin.) *F. W. Maitland*. 5 Can. L. Rev. 166.
- NATURE AND EXTENT OF AN AGENT'S AUTHORITY, THE. *Floyd R. Mechem*. 4 Mich. L. Rev. 433.
- NEED OF AN INTERNATIONAL CONFERENCE. *Edwin Maxey*. Advocating a conference for the solution of questions of international law raised by the Russo-Japanese war. 68 Alb. L. J. 35.
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- NOTES ON THE HISTORY AND DEVELOPMENT OF THE ROMAN-DUTCH LAW. (Continued.) *J. W. W.* 23 S. African L. J. 10.
- PRESUMPTIVE NEGLIGENCE. *Silas Alward*. 26 Can. L. T. 191.
- PROTECTION BY EQUITY OF CORPORATE NAMES AGAINST UNFAIR COMPETITION. *H. C. McCollom*. Contending that the same principles which govern trademarks should apply to corporate names, and that fraud should not be essential to an injunction. 6 Columbia L. Rev. 244.
- SECTION 117 OF THE CONSTITUTION. *F. L. Stow*. Commenting on a recent decision as to the meaning of "resident" in the clause of the Australian Constitution which forbids discrimination among residents of different states. 3 Commonwealth L. Rev. 97.
- TENTATIVE CODIFICATION OF THE OLD TESTAMENT LAWS, A. *Charles Foster Kent*. 15 Yale L. J. 284.
- TREATIES AS SOURCES OF INTERNATIONAL LAW. *Edwin Maxey*. 11 Va. L. Reg. 863.

- WHETHER A GRANT BY DEED OF A FISHING OR HUNTING RIGHT IS LIMITED IN ITS SCOPE TO THE CONDITIONS WITHIN THE VIEW OF, AND SURROUNDING THE PARTIES AT THE DATE OF THE DEED, OR IS TO BE CONSTRUED RELATIVE TO THE ADVANCEMENT OF SOCIETY AND THE IMPROVEMENT IN FACILITIES AFFECTING THE EXERCISE OF THE GRANTED RIGHT? *Alexander H. Robbins*. 62 Cent. L. J. 238.
- "WITHOUT PREJUDICE." *Anon.* Showing the interpretation of this phrase by English judges, when it has been used in correspondence between litigants. 70 Sol. J. 372.
- WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY IN BELGIUM, ENGLAND, FRANCE, AND ITALY. *G. de Leval, R. Newton Crane, B. H. Conner, Henry Burnham Bonne*. 18 Green Bag 216, 220, 223, 225.

II. BOOK REVIEWS.

ENGLISCHES STAATSRICHT, mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten. Von Julius Hatschek. 1 Band: Die Verfassung. Tübingen: J. C. B. Mohr (Paul Siebeck). 1905. pp. xii, 669, 4to.

This book is part of the monumental "Handbuch des Oeffentlichen Rechts," projected more than a score of years ago by Professor Marquardsen and designed to cover, in a series of monographs by different writers, the political institutions of all civilized countries. Many volumes of the series have already appeared, varying no doubt in excellence, but as a rule of great value, and Dr. Hatschek's book deserves from the author's vast learning, thorough research, and analytical thought, a high place among them. To say that one does not always agree with all his conclusions, to feel that he sometimes pushes them too far, is, perhaps, merely to say that they are often new and striking.

The book before us, which is only the first volume of his work on the English government, deals with the constitution, or rather with the fundamental legal institutions, and is for that reason of special interest to lawyers. Naturally he approaches the subject from the point of view of a German jurist, and with his mind full of ideas of scientific jurisprudence and administrative law, which illuminate, even if at times they slightly distort, the image. Such a treatment enlarges the horizon of the student of the Common Law, by helping him to distinguish those legal conceptions which are of universal application from those which are peculiar to his own system. But while many books upon the English government have been written by foreigners, most of them have had a serious defect. Professor Hatschek points out (p. 23 *et seq.*) that almost all continental observers have studied English institutions when a crisis was present or threatened in their own country, deducing those principles which they believed were needed at home; and he shows how this was true of Montesquieu with his doctrine of the separation of powers, and of Gneist with his ideas of the nature of self-government. From such a source of error Professor Hatschek himself claims to be, and is, free; his examination having a purely scientific, not a political motive.

He lays great stress, and most properly so, upon the fact that the Roman Law was not adopted in England at the time of its general "*rezeption*," as the Germans call it, by the continental nations; and to this cause he rightly attributes a great part of what is characteristic in the legal thought and political institutions of the nation. For that reason England has, he says (p. 10), never had a systematic legal theory of the state; and in the sense of the German "*Staatsrecht*" that is true. Between the writers on politics and jurisprudence on the one hand, and the lawyers on the other, there has been, he tells us (pp. 13, 14), a cleft which began with the decay in the study of Roman Law early in the seventeenth century, and has never been bridged. He adds that continental observers have made the great mistake of supposing that the English political philosophers like Hobbes, Locke and the rest were expounding English "*Staatsrecht*" when they were really out of touch with the law, —

a difficulty which hampered Bentham also in his efforts to construct an ideal legal system (pp. 30, 31).

In the next, and perhaps the most interesting chapter of the book (Kap. II), Professor Hatschek takes up the English law of corporations, and turns upon it a flood of light from Gierke's researches into the mediæval conceptions of communities. That part of Professor Gierke's work bearing upon the political theories of the middle ages was translated, and furnished with an introduction, by Professor Maitland a few years ago; and Professor Hatschek concurs in their views. He draws a sharp contrast between the mediæval German free community, with its independent corporate rights or privileges, with its power of organizing and directing itself, and of ruling its own members, and the English local body, without a true corporate character or essential corporate rights, but with common duties, and with its organization and the functions of its officers prescribed in the main by the law of the realm. The German law lacked, he says, the objective conception of a binding rule; it lacked Austin's fundamental quality of command coupled with a sanction. It appeared as a mass of subjective rights or liberties, as a series of claims or privileges of different elective bodies against each other, and hence German history is a battlefield of such bodies struggling together. In England, on the other hand, the local bodies were regulated by a national law administered by the royal judges, and thus the country was a consolidated realm with an orderly use of local communities for purposes of state. It was only at the close of the middle ages that the towns began to acquire by means of charters the power to own property as formal corporations, while for the other local bodies the place of this was supplied by the device of treating their officers as holding property in trust for them. The law of corporations grew under the Tudors, who used it both in the case of the towns and of the trading companies, to increase their own power; by treating all such bodies as institutions of the state. With its growth two principles became firmly established, one that a corporation aggregate could be created only by the Crown, the other that it could do only those things which it was specially empowered to do,—the doctrine familiar to-day under the name of *ultra vires*. Professor Hatschek adds that the theory of corporations even after its development in the nineteenth century by the Municipal Act of 1835, and the Companies Act of 1862, is still behind that of the continent, based upon the Roman and Canon Law.

In England the state itself was never treated as a corporation, and although the Crown came, like the bishop and the rector, to be regarded as a corporation sole, its authority was not a unit, but built up out of a mass of separate prerogatives; and this, Professor Hatschek tells us, is the reason for the absence of that general liability on the part of the Crown for the acts of its officials, which under the name of "*Fiscus*" attaches to the continental state. The absence of liability has had, he believes, a certain advantage; for as the Crown was not responsible for its officials, they have been liable for their own acts, with the result that every police officer or collector does not look upon himself as the incarnation of the state, a condition that has helped to preserve the individualism of the people. Moreover, the state, he adds, not being a corporation has never been regarded as omnipotent, like the continental state, and except during the Tudor period has never possessed an all-embracing police power (p. 53).

Professor Hatschek has a great deal to say about the relation to each other of common and statute law. He insists that a statute had originally simply the effect of a judgment; and is still in the nature of an amendment of the Common Law (pp. 95-98, 113 *et seq.*), so that whereas continental judges are strictly bound by a text which purports to cover the whole of the law, English statutes have in them gaps which the judges fill up from what is really a "*naturrecht*" (p. 154). This is an unusual way of putting the matter, but by no means an incorrect one, as Sir Frederick Pollock has shown in his articles on the History of the Law of Nature.¹ A man bred in the Common Law abhors the former

¹ Journal of the Soc. of Comp. Leg. 1900, No. 3; 1901, No. 2; s. c. 1 Columbia L. Rev. 11; 2 *Ibid.* 131.

German idea of "*naturrecht*" as a transcendental or scientific system of jurisprudence distinct from, or even at variance with, positive law. But he is not less opposed to a complete code which leaves no opportunity for judge-made law. The fact is that a transcendental system of jurisprudence and a code are not far apart, the code being a natural attempt to enact the ideal system and make it into positive law. Now the votary of the Common Law has no faith in any abstract scheme of jurisprudence perfect for all times and ages; but he conceives of the Common Law as founded upon, and constantly refreshed by, principles of natural justice. He believes in natural law, not in a form of a system to be excogitated by jurists apart from positive law, but as a general sense of justice in the court to guide it in the decision of doubtful cases.¹ Professor Hatschek refers to this point in discussing judicial legislation (pp. 101-5), and remarks that the search for legal analogies in English law differs from the same process on the continent only because it is done by counsel and judges in the course of deciding in actual cases, instead of being done by a scholar in the study of theoretical jurisprudence. But on account of these conditions under which law is evolved, he contends that the standard of juristic thought is higher on the continent, and that Sir Frederick Pollock is wrong in regarding case-law as a science.

When the author comes to the conventions of the English constitution he expresses views which reveal the great gulf between the conception of the nature of law held by Anglo-Saxon and continental writers. He argues (p. 543 *et seq.*) that these conventions are in reality rules of law, because, as Professor Dicey has pointed out in his *Law of the Constitution*, a violation of them if persisted in will almost inevitably lead to a violation of positive law; and therefore, contrary to the prevalent notion that the cabinet is unknown to the law, he concludes that the parliamentary executive, as he calls it, or, in other words, the cabinet in its relation to Parliament, is a legal institution. In the course of his argument (p. 546 note), he quotes Professor Dicey's statement that the conventions of the constitution are not laws because they are not recognized by any common law court, and says, "Even if this were true, is not the House of Commons a court?" To discuss the meaning of terms is usually a weariness of the flesh. But surely we have here what Kipling would call an error in the fourth discussion. There is a difference in fundamental conceptions that excludes a common standing ground. To the Anglo-Saxon, law means those rules which are enforced, or at least recognized as valid, by the courts of law. To the continental jurist it has no such limited significance. It includes rules enforced by tribunals of various kinds, or even by no tribunal at all. To the German or the Frenchman administrative law is not the less law because it is not within the jurisdiction of the ordinary courts; and the legal character of constitutional law does not depend upon the authority of some tribunal to disregard a statute enacted in violation of its provisions. Professor Dicey is perfectly right in saying that conventions of the constitution do not fall within the English conception of law, and Professor Hatschek may well be equally right in maintaining that they are true rules of law according to the German conception; but argument on the subject is fruitless until we agree upon a definition of law. The distinction should, however, be kept constantly in mind while reading what a German scholar tells us about English "*Staatsrecht*," for if not, one is liable to misconceive his meaning.

There are many other new and interesting things in this book, such, for example, as the history of the introduction into England in the thirties of the French method of making up the public accounts. This was based on double entry, and made it possible for the first time to present a really lucid statement of the national finances. But in a review of this kind it is impossible to do more than touch upon a few of the chief points that attract attention, and the reader who is interested in the subject can only be referred to the work itself.

A. L. L.

¹ In this connection it is curious to compare with the articles already noted Sir Frederick Pollock's earlier contempt for natural law in his review of Lorimer's *Institutes of Law: Essays in Jurisprudence and Ethics* (p. 18 *et seq.*). Yet his two views are not really inconsistent.

PROCEDURE: ITS THEORY AND PRACTICE. By William T. Hughes. In two volumes. Chicago: Callaghan and Company. 1905. pp. x, 1-390; 401-1289. 8vo.

The aim of "Hughes on Procedure" is stated to be, — (1) to indicate that underlying the whole body of the law and bounding and defining its rights and remedies are certain general, large, and well defined principles of procedure, which pervade not only the adjective but the substantive law, and give to the law a unity and a philosophy which can be discovered only by a study of procedure; (2) to ascertain those general principles of procedure as they have found expression both in the adjudged cases and in maxims; (3) to devise a plan of work whereby the maxims and the cases are worked in together, so that the general principles of procedure are indicated, as well as their particular applications in the cases and text-books.

In order to attain his end the author in his first part has shown that courts and laws exist for the purpose of defining by a judicial record the citizen's right. This record requirement, while not expressed, is interwoven in the constitutional guaranty of due process of law, which is the supreme law of the land. Mr. Hughes has looked at the record from the standpoint of the preservation of the division of state power, which is a constitutional implication. In the departments of appellate procedure, collateral attack, *res adjudicata* (including former jeopardy and estoppel by record), removal of causes from state to federal courts, and of the comity between the courts of different jurisdictions, the essentials of procedure are examined, and it is shown that a procedure which requires proper allegations of fact before a court having jurisdiction of the subject and parties and a judgment or decree responsive to the allegations, which written allegations and judgment or decree form the record, is a necessary constitutional implication. The doctrines of constructive notice of judicial proceedings and of justification of official acts depend upon such a system of procedure. The rules which govern the election of remedies, the exceptional rules arising from public policy, the rules of construction applied to laws and documents, and the rules to avoid delays in judicial proceedings, make a body of rules qualifying the making of the record. Finally is stated the rule which requires that when a record has been made, its existence is determined by its own inspection.

By a statement of the rules applying to appellate procedure and to matter which can be waived, he shows clearly the differences between the record proper and the statutory record.

There is, so far as we are aware, no work on pleading or practice where the line of thought found in this book has been followed. The author seems to have succeeded in generalizing the requirements of a sound procedure under all civilized systems of law.

The second part of the work shows those maxims which govern the making and ascertainment of a proper record, including those maxims of construction which govern not only the effect of records, but the effect of evidence which is being adduced to cause the court to make its adjudication, and which, when responsive to the pleadings, becomes the completion of the record.

The third part of the work consists of what is called the "Text-Index," which is a combination of leading cases and maxims, all indexed not only under the names of the cases and the leading words of the maxims, but also under the index heads of any ordinary legal digest. By cross references all the material to be found in the "Text-Index" can be concentrated on one particular subject. This part of the work can be utilized by one who has the name of a leading case, or the words of a maxim or merely the general digest head. At page 44 of the work the author explains simply and clearly how to use the "Text-Index."

The value of this "Text-Index" is that it refers to the leading text-books, the leading cases, the controlling maxims, and gives in the form of text short, concise statements of the law, and in the form of citations not only the leading cases but the cases of lesser importance and authority bearing upon the subject, with full references to all the notes in the annotated reports and to the text-books. Any lawyer is here given the full benefit of all the books in a large library without the labor of hunting out citations. As a statement of law and

cases the book can be used by itself, but it is at the same time an exhaustive citation of the books where the law upon the subject may be found in its fullest detail.

The effort of the abridger, the digester, and the text-book writer has been to render the vast bulk of the law more manageable. The fault with those methods is that they do not lay enough stress upon the difference in value between adjudications. To the abridger, the digester, and the encyclopedia writer all decisions are of the same importance. The same fault is noticeable in some text-books. But in the literature of the law just as in general literature, men must be constantly throwing away inferior matter. The value of the leading case system is that it places stress upon the decisions that are of highest value. The maxim classifies isolated cases under general principles. The text-book concentrates attention upon selected branches of the law. If now a subject in the law which moulds all others, can be so treated that by leading cases the valuable literature is indicated, by other cases of less value the applications of the general principle shown, and by the maxim the different branches of legal doctrine co-ordinated under certain general principles, while by concise text the various branches of the subject are indicated in its ramifications, the result will be a great boon to lawyers. Such a law book has been attempted in *Hughes on Procedure*. The learning of the author appears to be ample. Many of his ideas are new and convincing. His acquaintance with the literature of the subject is undoubtedly the result of vast and close reading. Lawyers and students will find this book not only intensely practical, but at the same time full of new ideas on procedure, which has always been the most important matter in our jurisprudence.

J. M. Z.

THE RULE AGAINST PERPETUITIES. By John Chipman Gray. Second Edition.

Boston: Little, Brown, and Company. 1906. pp. xlvii, 664. 8vo.

The new edition of Professor Gray's *Rule against Perpetuities* makes a volume of 664 pages, as against 499 pages of the first edition. With some of the additional material the reader is already familiar. It is pleasant to note that the appendix contains the substance of an article on Future Interests in Personal Property, originally published in the *HARVARD LAW REVIEW*, not omitting the delightful Socratic dialogue which started the re-examination of the subject. The discussion to which the decision in *Whitby v. Mitchell* (42 Ch. D. 494; 44 Ch. D. 85) gave rise is made the subject of brief comment in § 298 a-298 h. In view of this decision, the rule which it recognizes can hardly be spoken of as a non-existent rule, and it is strange that § 290 of the first edition in which the rule is thus referred to should have remained unaltered.

Notwithstanding the elaborate argument against determinable fees in a new appendix, Professor Gray seems now inclined to concede their validity at least for charitable purposes, although he always notices statutory interests of a similar character in streets and mining lands. We should say of this form of limitation what Professor Gray says of the validity of temporary charities with resulting trusts, that the doctrine, however objectionable, seems established (§ 41 a). After all, it is only little more objectionable than the recognition of a fee in land subject to the easement of a highway or railroad.

Perhaps the most interesting question (if it can still be called a question) in the rule against perpetuities is whether the rule is directed against remoteness of vesting or against inalienability. The commonly accepted view is that it is a rule against remoteness, and that the alienability of the remote interest does not prevent it from being void. Professor Gray's influence has perhaps been decisive in gaining acceptance for this view in this country. In England, authority has settled in its favor, though only in comparatively recent times; it is impossible to read the earlier cases without feeling that the great objection to perpetuities was inalienability. We gather from Mr. Gray's treatise that, as a rule against remoteness, the rule against perpetuities is notable chiefly for its exceptions. The most important practical applications of alienable, yet

possibly remote, interests are rights of entry after condition broken, covenants for renewal of leases, long term mortgages with rights of re-entry, and options to purchase. Of these only the latter are invalid, there being only one American case in point (§ 275 a; *Winsor v. Mills*, 157 Mass. 362). Limitations, like those in *Avern v. Lloyd* (L. R. 5 Eq. 383), and *In re Hargreaves* (43 Ch. D. 401), do not seem to have come before American courts. Professor Gray mentions as another alienable, but remote and therefore void interest, an executory devise to begin fifty years from testator's death (§ 201); yet a substantially identical interest may be created by reserving to the executors of the testator a term of fifty years. As we are constantly told that the rule against perpetuities is a practical rule, the value of a test which fails in most cases may be well doubted. Those states which have adopted as a test the suspension of the power of alienation have a rule of much greater simplicity, a rule which, moreover, also fits the case of interests vested without right of possession, which Professor Gray thinks must be met by the invention of a new rule (§ 121 i).

The most notable other additions which the new edition presents, are sections dealing with the period for the exercise of a power of sale by executors (§ 214 a-c), with the question whether a trust to pay income for an excessive number of years is good for twenty-one years (§ 410 a-d), with powers of sale given to trustees (§ 509 a-r), and with certain aspects of gifts to charities (§ 603 a-i), an appendix on gifts to indefinite persons for non-charitable purposes, and another appendix on the relation of conversion to the rule against perpetuities.

A large number of cases decided since the first edition are commented on.

It is superfluous to speak of the well-known merits of Professor Gray's work, of the profound learning of which it bears evidence, of the care and the excellent judgment with which all phases of a complex and difficult subject are discussed, of the lucidity and charm of its style. Of all American legal treatises Gray's *Rule against Perpetuities* probably comes nearest to being a "book of authority." The second edition will confirm its standing and increase its influence.

E. F.

A TREATISE ON THE LAW OF REAL PROPERTY. By Frank Goodwin. Boston: Little, Brown, and Company. 1905. pp. lii, 531. 8vo.

"This book is intended to be useful to students of law who are undertaking the study of real property." It is well adapted to carry out its intention. A student of law at a school using the case system will always find it greatly to his advantage after the completion of a subject in a course to read a standard work on that subject; and he could scarcely find a treatise on the law of real property better suited to his purpose than this treatise by Professor Goodwin. In it he will find a fairly comprehensive treatment of the main principles, developed in a scholarly and logical manner, and set forth in an excellent style, clear, concise, and readable.

The author expresses the hope "that the book will be found useful to the practitioner." Among other things, the practitioner requires an exhaustive citation of authorities; he wants a discussion of the latest cases; and he expects a statement of the arguments pro and con on mooted questions, with the author's solution of the problem. All this he desires, and in addition thereto he demands that every practical device be used to make the contents of the book available for ready reference. In short, the practitioner wants an encyclopaedic reference book. Professor Goodwin's treatise does not pretend to be that. Notwithstanding, it may be of considerable help to a Massachusetts lawyer. Massachusetts decisions are cited in great number to the practical exclusion of decisions in other jurisdictions. The latest Massachusetts cases of importance are noticed and discussed. Differences between Massachusetts rules and rules elsewhere are noted. Massachusetts statutes changing the common law are referred to. It is a treatise on the common law of real property from the Massachusetts standpoint.

Beyond this the book has no peculiar or noteworthy features. As might be expected, it contains little that is new, much that is old. Within the bounds of five hundred pages covering the nature of interests in real property, the creation and transfer thereof, and the rights and obligations appertaining thereto, one does not expect to find a statement of all the ramifications of a general principle and its multifarious applications to the complex conditions of a growing civilization. Within those pages Professor Goodwin has covered an old and familiar field in a worthy manner. C. M. O.

BRIEF MAKING AND THE USE OF LAW BOOKS. By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Alfred E. Mason, and James E. Wheeler. Edited by Nathan Abbott. St. Paul, Minn.: West Publishing Co. 1905. pp. viii, 472. 8vo.

The author of the introduction to this volume, William M. Lile, states an obvious truth: namely, that the graduates of our law schools do not know how to draw good briefs. Hence this volume of nearly five hundred pages. It is composed of four parts: I. The Brief on Appeal, by Henry S. Redfield, pp. 1-65; II. How to Use Decisions and Statutes, by Eugene S. Wambaugh, pp. 66-118; III. American Law Publications, by Alfred M. Mason (a classified guide to the authorities: statutes decisions, treatises, and digests), pp. 119-172; IV. How to find the Law, by James E. Wheeler (an alphabetical classification of the various topics of the law, with a brief description of the range and contents of each, concluding with a hundred odd pages of abbreviations of law publications), pp. 173-459.

If the advice and information contained in these pages cannot teach our law school graduates how to draw good briefs, "nothing can make 'em — the devil take 'em" — except possibly experience. If the instruction provided in the schools has not served to impress the students with the difference between a *dictum* and a decision, between statute law and judge-made law, between lower courts and higher, Professor Wambaugh's admirable treatment of these and similar matters offers them a last clear chance to learn; if they have not learned how to use the law school libraries, nor familiarized themselves with the abbreviations of the reports, here are over three hundred pages of eleventh-hour directions. In short, if muddy thinking may be clarified by precept, and unmethodical habits of work be corrected by putting his tool chest in order for the apprentice, no young attorney can read this book without profit. Pedagogics is nothing if not an optimistical science; if we could share the optimism of the cult, it would not be extravagant to predict that with the appearance of this work the days of bad brief drawing were over.

A SUMMARY OF TORTS. By Frank A. Erwin. Second Edition, revised and enlarged. New York City: Leslie J. Tompkins. 1906. pp. viii, 225. 8vo.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott. In three volumes. Volumes I and II. St. Paul, Minn.: Keefe-Davidson Company. 1905, 1906. pp. xix, 1-965; xvi, 967-1979. 8vo.

CURRENT LAW. A Complete Encyclopedia of New Law. Volume IV., Indictment to Witnesses. George Foster Longsdorf, Editor. Walter H. Shumaker, Associate. St. Paul, Minn.: Keefe-Davidson Company. 1905. pp. xv, 1971. 4to.

LIMITATIONS OF THE TAXING POWER, including Limitations upon Public Indebtedness. A Treatise upon the Constitutional Law governing Taxation and the Incurrence of Public Debt in the United States, and in the Territories. By James M. Gray. San Francisco: Bancroft-Whitney Company. 1906. pp. lx, 1316. 8vo.

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- THE VICTORIAN CHANCELLORS. By J. B. Atlay. In two volumes. Vol. I, Lord Lyndhurst, Lord Brougham, Lord Cottenham, Lord Truro. With portraits. Boston: Little, Brown, and Company. 1906. pp. x, 455. 8vo.

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